PETITION NOT PRINTED

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 183

EUGENE E. MAYNARD, PETITIONER,

vs.

DURHAM AND SOUTHERN RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

PETITION FOR CERTIORARI FILED APRIL 27, 1960

CERTIORARI GRANTED JUNE 27, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

INDEX

[fol. 1]

SUPREME COURT OF NORTH CAROLINA, FALL TERM, 1959

FROM WAKE

EUGENE E. MAYNARD,

v.

DURHAM & SOUTHERN RAILWAY COMPANY

Before Williams, J., Second April Regular Civil Term, 1959, Wake Superior Court, Plaintiff Appealed from Judgment of Nonsuit

EXCERPT FROM STIPULATION AS TO RECORD AND AS TO EXHIBITS —June 15, 1959

. . . . . .

[fol. 2] It is stipulated that all motions to remove and orders pertaining thereto are not a necessary part of the record, and shall not be printed as a part of the record and that the complaint, answer, and reply shall constitute the record pleadings for the hearing in the Supreme Court.

It is further stipulated and agreed that the defendant's Exhibits #1 and #2 (Report Personal Injury Form and Release Form) shall be included in the record in case on appeal by reference only and that photostatic copies of said exhibits shall be delivered to the Clerk of the Supreme Court for the use of the Justices of the Supreme Court.

This 15th day of June, 1959.

William T. Hatch, Samuel H. Johnson by: /s/ William T. Hatch, Attorneys for Plaintiff Appellant.
Clem B. Holding, Charles D. Nye, by /s/ Clem B. Holding, Attorneys for Defendant Appellee.

IN THE SUPERIOR COURT OF WAKE COUNTY, STATE OF NORTH CAROLINA

COMPLAINT

The plaintiff, complaining of the defendant, alleges and says:

1. That the plaintiff is now, and was at all times hereinafter referred to, a legal resident of Wake County, North Carolina.

2. That the defendant is now, and was at all times hereinafter referred to, a railroad corportation organized and [fol. 3] existing under the laws of the State of North Carolina, maintaining a line of railroad track running from Durham, North Carolina, through Durham County, Wake County, and into Harnett County, and extending in and around the corporate limits of the Town of Dunn, Harnett County, North Carolina; that the defedant was at all times hereinafter referred to a carrier of freight for hire, and was and is now engaged in interstate and intrastate commerce.

3. That this action is brought in accordance with the provisions of the Federal Employers' Liability Act of 1908, and the amendments thereto, regulating the liability of railroads engaged in interstate commerce for injuries to their employees.

4. That prior to the injury hereinafter set forth, occurring on the 22nd day of August, 1955, the plaintiff Eugene E. Maynard had attained an age of 37 years and was in excellent health and physical fitness, having never been hospitalized and having used the services of a doctor only once or twice in his life; that he was capable of earning, and did actually earn, a substantial livelihood as a section-hand foreman and worker with the Seaboard Air Line Railway and with the Durham & Southern Railway; and that he was capable of earning a substantial livelihood from other types of employment that required unusual physical fitness, endurance and bodily strength.

5. That on the 22nd day of August, 1955, the plaintiff was in the employment of the defendant railroad as an Apprentice Section-hand Foreman, and in that capacity it was the plaintiff's duty, under the rules and regulations

of the railroad, to obey the orders and directions of the Roadmaster and Foreman under which he was working.

6. That at or about 11:45 A.M. on August 22, 1955, the plaintiff was working for the defendant railroad at a street [fol. 4] crossing in or near Dunn, North Carolina; and that on this occasion the plaintiff was under the supervision of and receiving instructions from Mr. H. L. Tillerson, the defendant's Roadmaster, and Mr. Parrish, one of the defendant's Section Foremen.

7. That immediately preceding the injury, the plaintiff was working with a crew of three section hands repairing a street crossing on defendant's track, by placing heavy timbers alongside the rails at the crossing, which work was being performed under the direct supervision of Mr. Parrish and Mr. Tillerson; and that the plaintiff, under the direction of the Roadmaster, Mr. Tillerson, brought the Roadmaster's motor car from a warehouse along a spur track to the street crossing, for the purpose of loading it onto one of defendant's 1½ T trucks which was parked immediately adjacent to the crossing that was being repaired.

8. That the Roadmaster Mr. Tillerson directed plaintiff and three other section hands to load the motor car upon the rear of the truck, and the plaintiff inquired of the Roadmaster if they should use some of the heavy timbers lying around the rear of the truck for the purpose of sliding the motor car up the timbers and onto the rear of the truck, and the plaintiff was advised by the Roadmaster not to use the timbers but that there were sufficient men to lift the motor car onto the truck.

9. That the plaintiff and the other three section hands were not able to load the motor car onto the rear of the truck in their first effort, because the canvas windshield of the motor car caught on the canvas top of the truck; and that the plaintiff was then directed by the Section Foreman Mr. Parrish to get onto the rear of the truck in order to help lift the motor car onto the bed of the truck; and that the plaintiff obeyed this direction and placed himself upon the bed of the truck, which had a canvas top supported by timbers approximately 4 to 4½ feet above the truck bed, [fol. 5] which prevented plaintiff from standing erect but required him to work in a bent-over position, with his back

pressing against the timbers which supported the canvas; that the three section hands on the ground raised the motor car and shoved the rear end upward suddently and without warning onto the rear of the truck bed and up against the plaintiff, catching the palintiff's legs under the end of the motor car and wedging the plaintiff between the motor car and the wooden frame which supported the canvas cover on top of the truck, causing a sharp, sickening pain in plaintiff's back, near his waist-line.

10. That after the motor car was loaded upon the truck, the section crew, including the plaintiff, took a recess for the noon meal, during which time the plantiff felt an increasing and more severe pain in his back; and upon next seeing the Roadmaster, Mr. Tillerson, he advised him of this condition; that during the following hours of the day of the injury, the pain became more severe and agonizing, but the Roadmaster advised the plaintiff that it was probably a sprained muscle, and that he should continue working; that during the night the plaintiff applied hot packs to his back and took sedatives and the pain did not lessen; that the plaintiff reported to work the next morning and Mr. Tillerson, the Roadmaster, directed him to work that day and if the pain continued, the necessary form would be filled out; and that on the 23rd of August the plaintiff worked under the supervision of Mr. C. W. Brooks, another section foreman for defendant railroad, near Durham, but that due to the continuing pain in his back the plaintiff could not perform his duties, and that some of the section workers carried the plaintiff back to his home during the afternoon.

11. That as a result of the injury complained of above, the plaintiff was required to remain off of the job for a number of days, during which time he received examina-
[fol. 6] tions, shots, x-rays and other treatments from his own doctor and railroad doctors.

12. During the middle of September, 1955, the plaintiff was requested by Mr. H. A. McAllister, Vice President of the defendant railroad, to resume his employment, and that plaintiff did resume his employment, but that due to the continuing severe pain in his back he was unable to perform any services that required physical exertion, and worked in the office of Mr. Tillerson and in supervising section hands from time to time, during which period the

plaintiff continued to receive medical treatment from one to three times each week from railroad doctors.

13. That after the plaintiff resumed his employment in September, 1955, as set forth in paragraph 12, he performed his duties to the best of his ability, but due to the severe pain in his back when working the plaintiff generally did not take part in any work whatsoever, which the various foremen in charge were in a position to observe; that during this period of attempted work the plaintiff began to be troubled with his left leg, which would become numb and frequently give way, requiring plaintiff to rely substantially upon his right leg for walking, and in this connection the plaintiff's left ankle would turn if the stepped on a slight incline; that during this period a shrinking developed in the plaintiff's left leg, and that these difficulties became so intense that the plaintiff found it impossible to endure the pain and suffering which they caused in his attempt to remain on the job and perform whatever services possible, and for this reason the plaintiff found it necessary during May, 1956, to seek more bed rest, use more sedatives and attempt to obtain some satisfactory treatment and relief from these difficulties; that during the period between September, 1955, and May, 1956, the plaintiff was advised by the various railroad doctors that he should be admitted to the hospital for surgery, that he [fol. 7] should refrain from riding the railroad's motor cars, that he should wear a brace, and that he should obtain more rest and receive treatment; that the plaintiff followed to the best of his ability the directions of these doctors, and submitted himself for surgery, but that the doctors determined thereafter that his difficulty could not be corrected by surgery and that it would be necessary for him to bear the pain and suffering which he experienced without the probability of a cure.

14. That the conditions described in the preceding paragraph relating to the pain in the plaintiff's back and left leg, the shirking of the left leg and the difficulty with his left ankle have continued since May, 1956, until this time, and that the plaintiff has been unable to find any satisfactory treatment or cure to alleviate the pain and suffering which he is now experiencing.

15. That the injury complained of on the 22nd day of August, 1955, and the resulting difficulties that the plaintiff has experienced were all without any negligence whatsoever on the part of the plaintiff; that they are of a very serious painful and permanent nature; and that they were proximately caused by the negligent acts and omissions of the railroad, through its Roadmaster, Section Foreman, and various employees, in the following particulars, among other, to wit:

a. In that the defendant carelessly, negligently and unlawfully failed to use proper care to provide the plaintiff with a reasonable safe place to work.

b. In that the defendant carelessly, negligently and unlawfully failed to use proper care to provide the plaintiff with reasonably safe ways, means and methods of working.

c. In that the defendant carelessly, negligently and unlawfully caused, allowed, permitted and ordered the plain-[fol. 8] tiff, for the conventence of defendant's operation, to be placed in a position where he might reasonably be expected to receive bodily injury in loading the motor car upon the rear of the railroad's truck.

d. In that the defendant carelessly, negligently and unlawfully caused, allowed, permitted and ordered the plaintiff, for the convience of the defendant's operation, to engage in a method of loading defendant's motor car which might reasonably be expected to result in plaintiff's bodily injury, for the reason that said method of loading was contrary to the well regulated and safe custom generally used by railroads in this operation.

e. In that the defendant carelessly, negligently and unlawfully failed to use proper care and necessary precaution in supervising defendant's section hands on the ground who were engaged in loading the defendant's motor car onto the bed of the truck, in that after having first ordered the plaintiff into a position which the defendant knew or, in the exercise of due care, should have known might reasonably be expected to increase the possibility of injury to the plaintiff, the defendant was under a duty to exercise more than ordinary caution and that in this respect the defendant failed to exercise the degree of caution required under the circumstances.

16. That without negligence whatsoever on the part of the plaintiff, the plaintiff was seriously, painfully and permanently injured because of the negligent acts and omissions of the defendant, including those hereinbefore recited; that the plaintiff's back, left leg and left foot caused him continuing pain and suffering, which impairs his ability to sleep and rest, cause him to be nervous and prevent him from being gainfully employed at his former occupation or at any occupation which will be reasonably fitted to plaintiff's abilities, and which prevent the plaintiff from receiv-[fol. 9] ing the livelihood which he formerly received, for the reason that the plaintiff is not now able, because of the injury, to work regularly on any job.

17. That the plaintiff is informed, believes and so alleges that the pain in his back results from an injury to his spine and that one or more of the discs in his spine have been ruptured in a way that cannot be corrected by surgery; that the plaintiff is informed, believes and so alleges that he has measurable atrophy of his left leg, which is a type of shrinking of the cells in the leg; and that in addition the plaintiff has a parasthesia of the left leg, which is a tingling, crawling and burning sensation of the skin, both of which result directly from the injury complained of to plaintiff's back and spine; that the plaintiff is informed, believes and so alleges that the difficulty he experiences with his left ankle turning is the result of a dorsiflexor weakness of the left foot, which is a direct result of the injury complained of to plaintiff's back and spine; that as hereinbefore stated, these injuries and resulting difficulties caused the plaintiff constant and continuing pain and suffering and physical impairment; and the plaintiff is informed, believes and so alleges that these conditions cannot be alleviated by corrective treatment or surgery.

18. That as a result of the injury and impairments referred to in paragraph 17 above the plaintiff cannot stand or sit in any position for more than a few minutes at a time, and cannot sit straight and upright as a person normally can; that the plaintiff cannot bend forward more than a few degrees; that the plaintiff cannot walk normally, but must rely substantially upon his right leg; that the plaintiff cannot lift heavy objects and cannot work steadily; that in order for the plaintiff to move around and walk on the

limited basis described, he must constantly wear a tight [fol. 10] brace, which fits around the middle portion of his body and which causes him extreme discomfort; that the plaintiff has lost considerable income and his earning capacity has been decreased approximately 75%; and plaintiff is informed, believes and so alleges that each of these conditions will continue for the rest of his life; and that, in addition, the plaintiff has already suffered great physical and mental anguish and is informed, believes and so alleges that he will continue to suffer physical pain and mental as a direct result of said injury; that the plaintiff has incurred and will continue to incur bills for medical treatment ment, medicines and physicians' services, which will greatly exceed normal requirements, as a direct result of said injury.

19. That as a direct and proximate result of the negligent acts and omissions of the defendant, the plaintiff was permanently injured, as hereinbefore alleged, and has been damaged in the following amounts:

a. For prior lost earnings, based upon 75% of net pay, less sick benefits, making a net loss in the amount of $932.08.

b. For future lost earnings, based upon a life expectancy of 32.84 years and the present cash value of 75% of net income, making damage for future lost earnings in the total amount of $43,251.25.

c. For future medical expenses, based upon an estimate of $256.00 per year and computed for the life expectancy using present worth rule, in the total amount of $3,614.72.

d. For pain and suffering and medical anguish, the total amount of $40,000.00.

Wherefore, the plaintiff prays that he have and recover from the defendant the total sum of $87,798.05, together with the costs of this action to be taxed by the [fol. 11] Court; and for such other and futher relief as to the Court may seem just and proper.

/s/ William T. Hatch, /s/ Samuel H. Johnson,
Attorneys for Plaintiff.

(Verified)

IN THE SUPERIOR COURT OF WAKE COUNTY

ANSWER

The defendant, answering the complaint of the plaintiff, says:

1. That the allegations contained in paragraph 1 of the complaint are admitted.

2. That the allegations contained in paragraph 2 of the complaint are admitted.

3. That as to the allegations contained in paragraph 3 of the complaint, the defendant denies that it has any knowledge or information thereof sufficient to form a belief.

4. That the allegations contained in paragraph 4 of the complaint are denied, except that it is admitted that the plaintiff worked for the defendant as an apprentice section-hand foreman at a salary of $271.90 per month.

5. That the allegations contained in paragraph 5 of the complaint are admitted.

6. That the allegations contained in paragraph 6 of the complaint are admitted.

7. That the allegations contained in paragraph 7 of the complaint are admitted, except that it is specifically denied that the plaintiff was injured as alleged in the complaint.

8. That as to the allegations contained in paragraph 8 of the complaint, the defendant denies that it has any knowledge or information thereof sufficient to form a belief.

[fol. 12] 9. That the allegations contained in paragraph 9 of the complaint are denied.

10. That as to the allegations contained in paragraph 10 of the complaint, the defendant denies that it has any knowledge or information thereof sufficient to form a belief.

11. That the allegations contained in paragraph 11 of the complaint are denied, except as admitted in the defendant's further answer and defense hereinafter set forth.

12. That the allegations contained in paragraph 12 of the complaint are denied, except as admitted in the defendant's further answer and defense hereinafter set forth.

13. That as to the allegations contained in paragraph 13 of the complaint, the defendant denies that it has any knowledge or information thereof sufficient to form a belief.

14. That as to the allegations contained in paragraph 14

of the complaint, defendant denies that it has any knowledge or information thereof sufficient to form a belief.

15. That all and singular the allegations contained in paragraph 15 of the complaint are denied.

16. That the allegations contained in paragraph 16 of the complaint are denied.

17. That as to the allegations contained in paragraph 17 of the complaint, the defendant denies that it has any knowledge or information thereof sufficient to form a belief.

18. That as to the allegations contained in paragraph 18 of the complaint, the defendant denies that it has any knowledge or information thereof sufficient to form a belief.

19. That all and singular the allegations contained in [fol. 13] paragraph 19 of the complaint are denied.

Further answering the complaint of the plaintiff, and by way of further answer and defense to plaintiff's alleged cause of action and by way of plea in bar to plaintiff's alleged cause of action, the defendant says:

1. That the defendant and its employees were guilty of no negligent, careless, wrongful or unlawful conduct upon the occasion of the alleged injury as set out in the plaintiff's complaint and that if the plaintiff sustained any injuries as alleged in the complaint, said injuries, if any, were sustained by the plaintiff while he was performing a normal task in a normal manner.

2. That because of the alleged injuries as set forth in the complaint, the plaintiff was absent from his job with the defendant from August 24, 1955, until September 12, 1955; that during the period from August 24, 1955, to September 12, 1955, the plaintiff was treated by several doctors who advised the plaintiff that he should return to work on or around Monday, September 12, 1955.

3. That on or about the 17th day of September, 1955, the plaintiff executed and entered into a written contract with the defendant in the exact words and figures as follows:

"Durham and Southern Railway Company

RELEASE

Sept. 20, 1955.

Number 59.

E. E. Maynard. Month: September 1955.

Address: Apex, N. C. File

Know all Men by These Presents, That for and in consideration of the sum of One Hundred Forty Four Dollars and Sixty Cents—Dollars, ($144.60) to me in hand paid [fol. 14] by the Durham and Southern Railway Company, the receipt whereof is hereby acknowledged, I, E. E. Maynard, do hereby release and forever discharge the Durham and Southern Railway Company, its successors and assigns, from all claims, demands, actions or rights of action, of every nature whatsoever, now existing, or hereafter to arise, on account of, or in connection with Personal Injuries received at Dunn, N. C., on Monday, August 22, 1955, while assisting Mr. Parrish's section force in loading a track motor car on a company road truck, at or near Dunn, N. C., on or about the 22nd day of August, 1955, and all results attending or following, or which may hereafter arise therefrom.

This release is fully understood by me, constitutes the entire agreement between the parties hereto, and is executed solely for the consideration above expressed, without any other representation, promise, or agreement of any kind whatsoever.

Given under my hand — and seal —, at Durham, N. C., this the 17th day of September, 1955.

/s/ E. E. Maynard (Seal.)

Witness /s/ Chas. Phelps.
Witness /s/ E. Sweaney Jackson."

4. That in consideration of the contract of release as set forth immediately hereinabove, the defendant paid the plaintiff the sum of $144.60 and the acceptance of said sum by the plaintiff from the defendant, as set forth in the contract of release, constituted a full and final settle-

ment and release from the plaintiff to the defendant for all matters and things arising out of the alleged injury as complained of in the complaint, and the defendant now pleads said full and final settlement and release in bar of any right of the plaintiff to maintain this action or to recover any amount whatsoever from the defendant on [fol. 15] account of the matters and things alleged in the complaint.

Wherefore, having fully answered the complaint, the defendant prays that its plea in bar be allowed; that the plaintiff have and recover nothing by this action, and that the defendant be allowed to go hence without day and recover its costs in this action expended.

/s/ Charles B. Nye, /s/ Clem B. Holding, Attorneys for Defendant.

(Verified)

IN THE SUPERIOR COURT OF WAKE COUNTY

REPLY

The plaintiff, replying to the Answer and Further Answer and Defense filed herein, alleges and says:

1. That the allegations contained in paragraph 1 of the further answer and defense are untrue and are denied.

2. That in answer to the allegations contained in paragraph 2 of the further answer and defense, it is admitted that at the insistence of Mr. H. A. McAllister, Vice President of the defendant railroad, the plaintiff returned to the job, but he was unable to perform any of the duties that he had been able to perform prior to the serious and permanent injury received on the 22nd day of August, 1955; that doctors employed by the defendant railroad had examined the plaintiff, but had not at that time determined his true injury; that said doctors did diagnose his injury later and determined that it was of a permanent and disabling nature, as heretofore alleged in the Complaint. All other allegations not specifically admitted are denied.

3. That the purported contract of release which the defendant railroad alleges it had with the plaintiff was wrongfully secured, by means of fraud and duress, and without

[fol. 16] consideration; that at that time the plaintiff's condition and circumstances were such as to render him peculiarly susceptible and yielding to the pressure and undue influence exerted upon him, by means of which he was induced to sign a paper writing; that on the day on which the purported release was signed the plaintiff had secured the services of an acquaintance to drive him from Apex to Durham, he being at that time in extreme pain and considerably under the influence of the drugs which had been prescribed to relieve his suffering; that the purpose of his trip to Durham was to secure his regular pay, which he had not received and which he had been informed and believed he was entitled to receive; that his need for this pay was urgent, in that he had a wife and four children to support, and for the further reason that his wife was at that time ill and in need of hospitalization; that upon arriving at the office of the defendant railroad, he was directed to Mr. McAllister, the Vice President; that he explained to Mr. McAllister the reason for his visit to the office and the circumstances surrounding it; that Mr. McAllister thereupon took from his desk a printed form, advising the plaintiff that the only way in which he could receive the back pay due him was to sign the said paper; that Mr. McAllister filled out the form and advised him to sign it; that Mr. McAllister did not read the paper writing to him, did not permit him to read it himself, did not furnish him with a copy, and did not advise him of its contents; that the plaintiff's powers of reason were considerably dulled by the influence of the drugs which he had taken; that he was alone in the office with the said Mr. McAllister, Vice President for defendant railroad, and that he had no one else to whom he could turn for counsel and advice; that he was ignorant of the true import of his actions; that his necessity was urgent; that Mr. McAllister advised and urged him to sign the purported release; and he, being gravely influenced by his dependence upon and his trust in Mr. McAllister, agreed [fol. 17] to do as he was advised; that he was thereupon taken to another office of the defendant railroad, where two more employees of said railroad witnessed his signature to the purported release; that it was not until after he had signed the paper writing that he was ever informed of the amount of wages that he would receive.

That the defendant railroad knew at that time that the consideration, if any, was unconscionably inadequate and that it did not take into consideration either the plaintiff's mental and physical suffering or his loss of earning capacity; that the officers, agents and employees of the defendant railroad by their deceit and undue influence procured the signature of the plaintiff to a paper writing, which defendant terms a release, when in truth and fact it was known or should have been known at that time that the plaintiff had suffered painful, serious and permanent injuries as a result of the negligent, careless and unlawful conduct of defendant's agents, servants and employees.

That since the plaintiff sustained his injuries, the defendant railroad has at no time shown good faith in its dealings with him; that he was continuously harassed and coerced in an apparent effort to force him into a position harmful to his own welfare; and that the final act of the railroad toward him was to eject him from the railroad-owned house which he had occupied, at a time when he was unable to work and had no place to move his wife and four children.

4. That the allegations contained in paragraph 4 of the further answer and defense are untrue and are denied; and the plaintiff alleges that he has not been paid any amount by defendant railroad covering the injuries received; that the amount of $144.60 which has been paid to him was compensation to which he was entitled by reason of his employment; and the plaintiff therefore alleges [fols. 18-19] that the purported release as alleged in the Answer should be declared null and void and of no legal effect, and that it should be set aside.

Wherefore, the plaintiff, having fully replied to the further answer and defense filed in this cause, reiterates, re-adopts and reaffirms the allegations contained in his complaint; renews his prayer for judgment as set forth in said complaint; and further prays that the purported release, as alleged by defendant in this action, be declared null and void and of no legal effect, and that it be set aside.

/s/ William T. Hatch, /s/ Samuel H. Johnson, Attorneys for Plaintiff.

(Verified)

IN THE SUPERIOR COURT OF WAKE COUNTY

JUDGMENT—April 21, 1959

This Cause coming on to be heard before his Honor Clawson L. Williams, Judge Presiding, and a jury, at the Second April Regular Civil Term, 1959, of the Superior Court of Wake County, and the plaintiff having introduced his evidence and rested his case, and the defendant having thereupon moved for judgment as in case of nonsuit, and such motion having been refused, and the defendant having excepted, and the defendant having introduced its evidence and having at the close of all the evidence again moved for judgment as in case of nonsuit, and the Court being of the opinion that the motion so made at the close of all of the evidence, as aforesaid, should be allowed;

Now, Therefore, It is Ordered, Adjudged and Decreed that the plaintiff be, and he is hereby nonsuited, and that said cause be, and it is hereby dismissed, and that the defendant recover from the plaintiff the costs, to be taxed by the Clerk.

This 21st day of April, 1959.

/s/ Clawson L. Williams, Judge Presiding.

[fol. 20] **Plaintiff's Evidence**

* * * * * * *

[fol. 21] EUGENE EMERSON MAYNARD, Plaintiff, testified:

I am 41 years old. On August 22, 1955, I was employed by the Durham & Southern Railway Co. I was employed [fol. 22] by the Durham & Southern Railway Company in May of 1955 as an apprentice Section Foreman and had been serving in that capacity from the date of my first employment by the Durham and Southern.

When I went to work for the Durham and Southern Railway Company I was living at Council, North Carolina. I later came to Wake County to live. I lived in the Section Foreman House at Apex. I was living in the Section Foreman House at Apex on the 22nd day of August, 1955.

On August 22, 1955, I was working under Mr. Tillerson, the Roadmaster, and I worked part of the time for Mr. Brooks and part of the time under Mr. Bailey. I guess

you would call Mr. Brooks a Carpenter Foreman; I don't know just what his title was. Mr. Bailey was the Section Foreman. Mr. Tillerson was the Roadmaster.

On August 22, 1955, I was working with the Durham and Southern Railway Company. Mr. Tillerson, Mr. Parrish and the laborers, whose names I don't recall, were working with me on the railroad on that particular day. That day, Mr. Tillerson and myself, and Mr. Bailey with his crew, loaded some timbers on the truck. I did not load the timbers myself; Mr. Bailey had his crew to load them. The timbers were loaded on a regular ton-and-one-half Chevrolet motor truck. The truck belonged to the Durham and Southern Railway Company. We went to Dunn, N. C., in the same truck. I drove the truck and Mr. Tillerson and myself went together. There were several pieces of timber on the truck but it was not loaded. We carried the timbers to a street crossing in Dunn. When we got there we saw Mr. Parrish and his crew. Mr. Tillerson told me to pull the timbers off the back of the truck where the truck was sitting so I just pulled them off and let them fall and lay there on the ground. The timbers were the kind of timbers which go along the side of the running rail in the crossing to hold the space. Each piece of timber measured about 4½ by 5 inches and varied in length from 10 to 14 feet. The timbers had not been used when we left. [fol. 23] Mr. Tillerson told me to go down to the Parrish Tool House and get his motor car and to bring it down on the track and to load it on a truck. That was his own private car that he used to ride on, a two-man motor car that moves along the rails. The motor car was loaded on the truck. It was a motor car that was used on the railroad track and was in Mr. Parrish's Tool House. The tool house was located about three blocks from where we were working down the track toward Coats. The tool house was located on railroad property.

We have a turntable that you can roll it up on and turn it around and put it on the main line. That's the way I got the car, got it on the track and cranked it up and drove it down to where the truck was. I am speaking of the same truck that I came from Apex in, the truck that I went in from Apex to Dunn. The truck was a ton-and-one-half Chevrolet. It was just an ordinary flat body truck with a canvas top supported by timbers. The top was approxi-

mately 3½ or 4 feet from the bed of the truck. What I mean by saying that it was 3½ or 4 feet from the bed of the truck is that that is how far it was from the top of the bed to the bottom of it. I would say that the top was made out of ribs about 1 by 4 or 1 by 5.

When I got back with the motor car, Mr. Tillerson told us to go ahead and load it on the truck. I asked Mr. Tillerson if he wanted us to put up any of the timbers that we had brought so that we could roll the car up on them. I asked him about putting the timber at the back of the truck with one end on the ground and one end on the truck so as to roll the motor car up on them. He told me, "No, there is enough of us to eat it," and told us to pick it up and set it in, so we picked it up and found that the windshield of the motor car.

At the time I don't remember where I was, but I was helping to load the car. The windshield wouldn't go under [fol. 24] the top of the truck that was over the bed, so we had to let it down to the ground and turn it around. Mr. Parrish told me to get up in the bed of the truck and catch the end of it when they handed it up there. I got up in the truck and they sat the end up and I caught the end of the motor car and they pushed the other end on in. When I was in the truck, I was in a stooped position. I couldn't straighten up for the top of the truck. Then they shoved the thing in on me. It went in the length of the car except for the front wheels in which dropped down back at the end of the bed. The three men of Mr. Parrish's picked it up. They picked it up, put the car in there, and shoved it into me, catching my legs across the bottom frame of the car and the iron of the motor car caught me in the chest and my back because it was against the top braces in the top, and I couldn't go any further there, and I told them to get the thing off of me, not to push it on me, and so they released it and I got out, and they pushed the car on back into the bed of the truck.

I didn't say anything. They immediately left and went on to dinner and I didn't see them again until after they came back from dinner.

When the tuck was pushed in on me and I was caught between it and the top, I felt a sharp, stabbing, sickening pain in the small of my back, and it kind of cut my wind off there for a minute and then they released the car and

I got out and it kind of eased off after a little bit until I started to step back and then I had the same pain again, the same pain in my back again. I sort of held on to the car on back to the front of the truck and I don't know the time, but I possibly stayed in there maybe five or six minutes. I don't recall exactly how long, but when I came out of the truck Mr. Tillerson and Mr. Parrish and his men had gone to eat dinner, so I got out and got into the cab of the truck and that is where I was when Mr. Tillerson came back.

[fol. 25] When Mr. Tillerson came back, I told him that I had hurt my back loading the motor car and he said, "You just probably strained a muscle; it will be all right in a little while."

We had two 5-gallon buckets of paint to go to Varina to paint the top of a warehouse with and Mr. Tillerson told me to go and get that and load them on the truck. I did that and we went to Varina. When we got to Varina, Mr. Tillerson told me to take the two five-gallon buckets of paint to the warehouse. Mr. Brooks and Mr. Tillerson were painting and Mr. Tillerson told me to take the two 5-gallon buckets of paint and carry it to them. I carried one of them up a ladder, carried it about half way up the ladder, and Mr. Brooks took it on up the ladder for me. I carried the paint about as far up the ladder as I could go then; I was hurting my back.

Mr. Tillerson and I went on to Apex then. When we left Apex and got out on the highway, he asked me if my back was still hurting and I told him it was. He told me to go on to the house and take it easy. I got back at approximately 3:30. We have different times to go to work, eight hours' work. I went to work at 7 o'clock. We have 30 minutes for dinner.

I went back to Mr. Tillerson's office the next morning and told him my back was hurt. He said that that would be the first report of an accident that he had had in four years and for me to go to Durham and work with Mr. Brooks and Mr. Wilson that day and if it wasn't any better, to come in that afternoon and he would fill out the Form 408, I believe it is, the form to be filled out when someone gets hurt on the railroad. I went to Durham and worked with Mr. Brooks. I stayed there until about

3 o'clock and then left Durham to come in, but I didn't work any after dinner.

The next day Mr. Tillerson sent me to see Dr. Goodwin [fol. 26] in Apex. I went to see Dr. Goodwin. As a result of what he said to me, I came home and went to bed. I stayed in bed all that day. It was during the morning when I saw Dr. Goodwin, but I don't remember the exact time. I went to bed because I was hurting.

The next day Mr. Tillerson came to my house and carried me to Durham to see Dr. Wilson. Dr. Wilson is a company doctor. Dr. Wilson examined me. I stayed there approximately an hour and a half or two hours. After that, I came back home and went back to bed. I stayed in bed until the next day. There is a day that I went back to Dr. Wilson, don't remember which one it was. I did go back to Dr. Wilson, though. In all, I went to see Dr. Wilson, Dr. Bugg, Dr. Conrad, and Dr. Owens and two others but I don't know their names. Dr. Wilson referred me to the other doctors. I don't remember how many times I saw them; it was several times, but I don't know how many. Dr. Wilson sent me to Dr. Conrad and Dr. Bugg and Dr. Bugg referred me to Dr. Owens over at Duke Hospital. I went to see Dr. Owens at Duke Hospital some three or four times, but I don't remember just how many, directly. I don't remember the dates that I went to see them. Dr. Owens had me admitted to Duke Hospital. I stayed at Duke Hospital either six or seven days. I think I came out on the seventh day. The doctor examined me and gave me a myelogram. They just examined me and gave me a myelogram and gave me heat therapy treatments. I was discharged by Dr. Bugg from the hospital. I was not discharged by Dr. Wilson. I went back home from the hospital. I don't know just how long I stayed at home, then I went back to Dr. Wilson. At home I was in bed on a board.

Prior to the 22nd day of August, 1955, my back did not give me any trouble at all. None of the doctors prescribed anything for me except the brace. Dr. Wilson prescribed that. It was a corset-type brace, steel brace in the back. The brace went around my waist. I wore it regularly every day and night for a year or a year and [fol. 27] a half. I have to wear the brace about half the

time now. If I am going to do any riding or working much, I have to wear it. I went back to the railroad to work, but I do not remember the date that I went back to work. I worked until the 16th day of May of the following year.

When I first went back, Mr. Tillerson put me in his office, working in his office. I was not out on the Section. I worked in Mr. Tillerson's office three days. Then he put me to working with Mr. Brooks. Mr. Brooks did general repair, carpenter work, and I worked around with him. I went back to riding the motor car but I couldn't keep that up; it hurt me, caused cramp and muscle spasms. I was never able to do the work that I had done prior to August 22, 1955. My back hasn't changed any the last year. It still hurts and I still have some muscle spasms as I go along, as I walk along or do any riding at all, or do anything without the brace. If I do any great amount of walking or riding with the brace, I have muscle spasms in my back in the lower part of my back will show the effect. It just draws and hurts, pains; a sickening, aching pain. There are other parts of my body affected. My left leg gives me a great deal of trouble. It hurts and it aches all the way down and is weak. It doesn't have the feeling that my right leg has. I never had any difficulty with that leg in the respect which I have described prior to August 22, 1955. It has effect on my ankle. My ankle is weak and it has a tendency to want to turn unless I am on level ground. While walking on an incline it has a tendency to want to turn over.

After all the trips that I have described to the doctors and to Duke Hospital and after I had returned to work for the railroad, I worked until May 16, 1956. I was paid for the time that I worked for the railroad all except for the trips from the 16th day of May until I was officially discharged. I have never been paid for that. I was paid [fol. 28] by check. Mr. McAllister gave me the check. The amount was $144.60, I believe, although I am not sure about the exact number of cents.

The circumstances under which I received that check are that I went into Mr. McAllister's office that morning and told him that I wanted my pay check. He asked me how I was getting along, how I was feeling. I told him I wasn't any better, that I was still hurting, and so he gave

me a paper, told me to sign that, and I signed it. The paper was in his desk drawer. He took it out of the drawer. There was no one in the office at the time other than Mr. McAllister and myself. He asked me how I was getting along, and I told him I wasn't better, that I still hurt. He asked me what he could do for me and I told him I wanted my pay check, meaning that I wanted a check for what was due to me for my time with the railroad. Then Mr. McAllister gave me the paper and told me to sign it. He took the paper then and went into another room. I did not read the paper. He turned the paper around on his desk, just turned it around with his hand, and I signed it. He didn't take his hand off the paper. Then he got up and went into another room and had two people in there to sign it. I don't know who they were. I went in Durham on that particular morning in my car. I got Mr. McLeod to drive me over there because I wasn't able to drive. At that time I was under Dr. Wilson's care. I had been to Dr. Goodwin and he gave me a prescription to get some pain tablets, which I had filled on two different occasions.

On the particular morning that I went to Durham I was taking medicine that had been prescribed by the doctors.

After Mr. McAllister gave me a paper and I signed it, he told me to come and go with him to another office. He told them that he wanted them to sign that paper and they did. Nothing was explained to be about it at all. I signed the [fol. 29] paper because every check that we ever got from the railroad we had to sign for it. I thought I had to sign it for my pay check. At that time the railroad owed me $144.60 odd cents for labor. I never received anything from the railroad as a result of the injury which I have described here today.

Later I went back to the office of Mr. Nye. Mr. Nye was there and Mr. Tillerson and Mr. Bailey and Mr. McAllister and Mr. Holder. They wanted me to go back and work, to try working for 30 days. They said if I would go back and try to work 30 days and I couldn't do it that they would help me to get a retirement pension. They told me that before they put me to work they would pay me my money; that they would pay me for the time that I was out; that I would have to sign a release. That was after I had received the $144.60. It was six months later, maybe more. I did

not sign any paper on that date. I have not signed any papers since that date. Mr. Bailey, the gentleman that was sworn in here awhile ago, was one that was with me on that date. He was Section Foreman with the railroad. He was also our local Brotherhood chairman. I asked him to go there with me. I had told him about my injuries. I don't remember when I told him about them. It was something prior to this time that we all went to Durham together. It wasn't too long after I got hurt that I told them, but I don't remember how long it was. Mr. Parrish knew about my injury; I told him the next time I saw him, but I don't remember how long that was.

I was never admitted for surgery. Prior to August 22, 1955, and since that time and up to the present day, I have never been injured in any way other than what I described as having occurred on August 22, 1955.

I don't remember the exact figure of my salary with the railroad, but it was 200 and some odd dollars per month. Without knowing the exact dollars I would be afraid to say that the sum of $291.50 a month was about correct.

[fol. 30] I was not able to work after May of 1956. It was 26 months before I could do anything. I later went to see Dr. A. E. Harer, who lives here in Raleigh. That is Dr. A. E. Harer out in Cameron Village. My last visit to see Dr. Harer was last Saturday. I saw him this past Saturday. I was examined by him at that time. I do not have control of my back now. I can squat on my legs and pick up something, but I can't stoop and pick up anything. I can't bend, it hurts me so, and I just can't straighten up if I do bend.

Mr. McAllister came over to Apex after August 22, 1955. I don't remember how long after August 22, 1955. I discussed my injuries with him there. Mr. McAllister is employed by the defendant's railroad as Vice President. I don't remember whether I talked with Mr. McAllister at Apex about my injuries before September 17, 1955.

After the 26 months expired, I went to work with Mr. Sneeden as underground foreman. My duties with him were laying telephone cables. I actually supervised the laborers. I did not do any manual work. I started working there on May 9th and worked until last Tuesday, May 9th of 1958. I did not receive the same wages that I received while working for the railroad company. I received $70.00 per week there. I am not working there now. I am

not working there now because riding in the trucks hurt my back and caused muscle spasms so I couldn't go to the jobs where they were working at, so I quit. My family lives in Counsel and I was staying up there and trying to come home on week-ends and the riding was just too much for me; I just can't take it.

The difference in my physical condition now, as compared to what it was prior to August 22, 1955, is that I have the muscle spasms; muscle spasms were there all the time for a good long time. The muscle spasms were not there before August 22, 1955. I did not have any muscle spasms prior to that date. I do not now have the muscle spasms all the [fol. 31] time unless I do a lot of riding or walking. I have the spasms on occasions if I have to do a lot of riding or walking. I am not now able to perform the same kind of work that I performed prior to August 22, 1955.

Cross-examination:

This is my signature on this paper. This is my signature on this paper, too. I say in my complaint "that the three section hands on the ground raised the motor car and shoved the rear end upward suddenly and without warning onto the rear of the truck bed and up against the plaintiff, catching the plaintiff's legs under the end of the motor car and wedging the plaintiff between the motor car and the wooden frame which supported the canvas cover on top of the truck, causing a sharp, sickening pain in plaintiff's back, near his waist-line." That is the way it happened. The reason it happened and I got injured was because they shoved it in there suddenly and wedged me between the top of the truck, I reckon. That's the only way I know I was hurt. If they had given me time I could have backed up along with the car and wouldn't have been hurt. The only reason I got hurt was because of the sudden movement of the motor car into the truck. The motor car was about the size of that table over there. I could not pick up one side of it with one hand.

I actually helped to lift the motor car at one time. I helped to lift it off the ground the first time when it wouldn't go into the truck. I don't remember just where I was, but I helped load it; helped lift it. I remember that Walter Covington, Eugene Whi[illegible] and Freddie Williams

picked the back end up and put it up there, but I helped them put it up there, too. I don't remember now where I was standing but I think I was standing on the right-hand side of the truck. I am not positive of being there at that place, but I am positive that I helped them put the car up on the truck and when we couldn't get it in that way, Mr. Parrish told me to get up in the truck and catch hold of the [fol. 32] end of the car. They had lifted the two front wheels of the motor car up into the truck before I got in the truck. I don't remember which side I was on. I don't remember whether I was standing toward the front or toward the back of the truck. The three colored people and myself lifted it up there. One man can't lift one end of the motor car that high. I don't know whether one man can take hold of the motor car and lift one end of it. I was a strong man before I was hurt. I complained to Mr. Tillerson about being hurt that day. We rode to Varina and later I got in the truck with Mr. Tillerson and rode back to Apex. I picked up the paint, like I said. We carried the paint to Varina.

Mr. Parrish was standing right there when the motor car was loaded into the truck. I have called him as a witness. I wasn't very well acquainted with Freddie White I can't say that I recognized Freddie White. I recognized that Freddie White was one of the laborers that helped put the car on the truck. Walter Covington is one that I do recognize.

The first time that I mentioned that my back had been hurt to Mr. Tillerson was as soon as he came back from his dinner, I did not tell him the next morning, on Tuesday, that I had hurt my back on the previous day and that I thought it was all right.

After I was injured we took the truck and came on to Apex and he told me to put the truck up and go to the house. I did not work all day Monday, the day I hurt my back. I was out there on Tuesday, the following day, but they brought me in about 3 o'clock: I didn't work any that day after lunch, after noontime. Wednesday, the third day, was the day Mr. Tillerson made the appointment for me to go to see Dr. Goodwin. I went to see Dr. Goodwin. I did not fill out a personal injury report after the accident. Mr. Tillerson filled that out. I don't know whether I signed a personal injury report the next day or when it was. I did

[fol. 33] sign it, but I don't know when. I will have to see it to tell you. The paper that you are showing me now is it. That's my signature; I signed it.

I went to the tenth grade in school; stopped at the tenth grade.

I didn't read that paper, but I signed it. That paper states that I was familiar with the duties I was performing at the time of the injury. I haven't read it. It states on here that the machinery and equipment was in proper working order. It states on here that I would probably have no disability, that none was expected. I didn't expect much disability at that time. I didn't know how bad my disability was at that time. I didn't expect any permanent disability. I just thought it was a mild back strain that I would get over within a few weeks or a month. When I signed it with the answer to the probable disability, "None," I meant it at that time.

I don't know what that paper said with reference to whether any rules were violated. Now that I look at it, that's what it says on there. Under the question, "Was the equipment causing the accident properly handled?" on this form, the answer there is, "Yes."

That accident form report has a question on it, "Was the injured person in the proper place when injured?" My answer to that on there is, "Yes."

At the time I filled out that accident report I had no idea I would ever get into a lawsuit about it. The accident happened on August 22, 1955. I reported back to work the next morning. I reported back to work on Tuesday, the 23rd of August, and worked all day that day, following the Monday I was hurt. On the next day I went to see the doctor over at Apex; I went over there on Wednesday. I don't remember the date that I came back to work following that. I don't remember whether I had been back on the job one week before I signed that paper. I don't remember whether I worked a week before I signed [fol. 34] that paper.

I worked for the Seaboard Railroad for a little better than nine years, I believe, before I went to work for the Durham & Southern Railway Company. I had trouble with an injured finger while I was working for the Seaboard. I was away from work on account of that finger

for about four hours. I did not sign a release to the Seaboard after I came back to work. It wasn't during working hours that I was out. I got the finger cut off, injured in the door of a car. It was right at the time they knocked off from work, at the closing of the day in the afternoon. We were knocking off, preparing to knock off. I was still on duty with the Seaboard when I got the finger injured. I filled out an accident report. I don't remember whether I signed a release for the Seaboard Air Line Company three days later.

That is my signature on that release to the Durham and Southern Railway Company dated the 17th day of September, 1955. I signed it. Mr. McAllister was very nice all the way through. I guess he is a salaried employee of the railroad, just like I am. He did not tell me at the time that I was signing a release. I did not tell Mr. Tillerson before I went to Mr. McAllister's office on Saturday that I wanted to go down there and settle up for my lost time.

I did not know that it was the standing policy of the Durham and Southern Railway Company that when an employee is injured on the railroad that it would pay the injured employee only upon the signing of a release.

I thought they were paying while you were out. I mean I hadn't been discharged from the railroad. I just wasn't able to work. I had never been discharged. I expected wages when I was not working because I just figured it was mine. I had never been discharged from the railroad and was just off because I was hurt. When I came back Mr. McAllister did not sit down and tell me what this [fol. 35] release was. I deny that. I did not try to read this release. He didn't give me a chance to read it. I didn't ask him to let me read it. This wasn't the kind of thing that I would sign for my regular pay check. I didn't know what it was. I just did not give it no thought.

I have a tenth grade education. I would have to say that I was not rational that day. I didn't know what I was doing that day. I remember very distinctly that Mr. McAllister kept his hand on it. I do not remember what time it was; it was in the morning, but I don't remember just what time it was. I don't know what makes me remember so distinctly now about him putting his hand on

the paper, that's just one of the things I remember. In fact, that was about the only thing that happened that day that there was to remember.

I didn't know what I was signing. I didn't ask what I was signing. He didn't tell me what I was signing. It could have been a check. I guess I would have signed anything that he gave me that morning, because I thought I was signing for my paycheck and then again I thought a lot of Mr. McAllister and he seemed to be the same way there with me. I didn't think he would tell me to sign anything and not explain it to me. He didn't explain it to me. After the 17th of September, 1955, when I signed that release I worked for the railroad until May 16. Then I stopped and went to see the doctor.

I saw three or four specialists out at Duke Hospital. I was informed and knew and believed that they were the best at Duke Hospital. They treated me. They examined me thoroughly, put me in the hospital so that they could observe and examine me. I do not remember Dr. Lockhart. I do not remember that Dr. Lockhart at Duke Hospital examined me on August 27, 1956. The only one I remember there was Dr. Owens. I don't remember that the doctor examined me on August 27, 1956, and told me that if I were to lose a little weight and come back to [fol. 36] work on the railroad and limber up I would get better.

I called at Mr. McAllister's office on September 7, 1956, in the presence of Mr. Sam Johnson. I don't know what purpose of that visit was. Mr. Tillerson told me that they wanted me to meet with them in Mr. McAllister's office there that morning. I had a conference with Mr. McAllister just in the presence of Mr. Tillerson and Mr. Johnson and myself. I don't remember whether Mr. McAllister told me that the doctors had advised that I should return to work and that he wanted me to return to work. I left Mr. McAllister's office to go and see Dr. Wilson that afternoon. Dr. Wilson talked to me every time I went to see him. He had a long talk with me and reviewed with me all of the reports from those specialists out at Duke Hospital.

Mr. McAllister and Mr. Tillerson came over to my home one day and talked to me, but I don't remember the date. Mr. McAllister did not to my knowledge bring

with him a letter that he had received from Dr. Wilson. I don't remember it.

I had a long discussion with Mr. McAllister that day about coming back to work for the Durham and Southern Railway Company. He advised me that my seniority was still opened, and wanted to know whether or not I was going to come back to work. I discussed that with him. I don't remember whether I discussed with him what Dr. Wilson had told him, and what Dr. Wilson thought about my ability to come back to work. When I talked with Mr. McAllister and Mr. Tillerson, I don't remember whether I told them at that time that I was coming back to work for the Durham and Southern Railroad on the morning of September 17, 1956. After I talked to the doctor, I told them that I would come back to work in the rear future. I told them that day, on the 14th of September, after I talked to the doctor, that I would come back to work.

[fol. 37] After talking with the doctor I went to Mr. R. L. Holder's office in Durham on October 12. Mr. Holder, in my presence, called you over the telephone. Mr. Holder, in my presence, told you on the phone that I had fired my lawyers and that I wanted to talk with you about coming back. I came to your office with Mr. Holder. I told you that I had discharged my attorneys. The doctor told me to go back to work and try it for 30 days. I told you that I wanted to return to work. I told you that the retirement board would not approve my retirement and that I had to come back to work. I don't remember saying that the retirement board had said that I was not totally damaged and that I had to come back to work. They had said that I was not totally disabled. I had applied for retirement. The board turned me down. I had applied for it.

On October 12, 1956, you told me that I could have my job back. You told me I could come back but Mr. McAllister said, "no," unless I would sign a full release. Mr. McAllister was not in the office with you at that time when you were talking to me. The only person that was in the office with me at that time were you and Mr. Holder, only you two people. But you didn't tell me I could come back to work. You said you would have to discuss the matter with Mr. McAllister, or that I would have to discuss it with him. You made an appointment for me to

see Mr. McAllister but I don't remember the date. I had the feeling that if I came back to work I would be hired and then fired.

I was never discharged until I was discharged in December, 1956. I imagine it was in October of 1956 that we were talking about this with Mr. Holder in your office, but I don't remember the date. I had a feeling of insecurity. You told me that if I were hired and came back in good faith that you would expect me to come back in good faith.

[fol. 38] I don't remember whether I had a conference with Mr. McAllister on the 15th of October. The next conversation I remember with Mr. McAllister was in your office.

I did go and talk to Mr. McAllister and told him that before I came back there were two or three things that I wanted to straighten out. I told him I wanted a conference with Mr. Parrish and Mr. Bailey. I told Mr. McAllister that I wanted a conference with Mr. Bailey present because he was the head of my labor group and because Mr. Parrish was my foreman. I don't remember the date, but I do remember a meeting with those people at your office. Mr. Bailey came. Mr. Bailey made the statement that he wasn't going to take part in it. But he was there listening to every word that was said. Mr. Tillerson was there. Mr. Holder and Mr. McAllister were there. I did not make the statement that I wanted to come back to work and could work. I don't remember that I stood up for you and told you how I could move around. I don't remember that I stated that as long as I didn't have to do manual labor I could do an apprentice foreman work. The only thing that was brought up that I can recollect was the riding of the motor car and I told you that I couldn't do it. At that time, I had been off the job since May of 1956. I don't remember the date of that meeting. It was sometime in the fall. It was after I had fired my lawyers the first time. You told me at that time that you would hire me back again. You told me that you would hire me back again in good faith and that you would expect me to come back in good faith.

We started discussing how much back wages I would get. I asked how much back wages I would get. I asked if you couldn't give me back wages when I was out. I

mentioned the first of September because I hadn't come to work because the doctors hadn't told me to. At that meeting I asked you what you were going to do about my [fol. 39] back pay, or you asked about it, and Mr. McAllister told you that the minute I signed a full release I would receive by back wages and could go to work. I remember that you told me that Mr. McAllister wouldn't approve of any wages paid further than the first of September because I hadn't reported back to work after the doctors had told me that I could go back to work. I didn't get mad. That is not when I changed my mind about coming back to work. I did not change my mind then. I did not come back to work after that. I didn't call you and tell you that I was going to move back to Council.

I did not admit that night that I knew from the day I came with the Durham and Southern Railway Company that when somebody was injured on the railroad, regardless of whose fault it was, that if he came back to work the railroad would pay him his back wages and for two reasons would get a full release; one reason so it wouldn't be lawsuits and the other reason for public relations. I don t remember that you told me that very night.

I do not know where Ridgewood, North Carolina, is located. I do know C. D. Russ, who owns a service station at Regalwood. I did not work there for him from some time in October through December of 1957. I didn't work with him but five weeks because I got tired and couldn't do the work. I was not fired for getting drunk on the job.

I know Mr. Ed Hobbs at Council. I didn't tell him about six months ago that I wasn't going to get another job until I got a lawyer. I haven't talked to Ed Hobbs in two years. I see him every once in awhile. I don't speak to him when I see him except in passing on the street. I don't stop. I did some work at night, on Sunday nights, in Apex during 1956 at a service station. I did not have a little shop at the back of my house. I did not hurt my back while working at a service station at night. I didn't work at any filling station until after I was hurt working on the railroad.

[fol. 40] I complained to Mr. Tillerson about my back being hurt the day that I have testified it was hurt. I did not complain to Mr. Parrish. I guess you would call Mr.

Parrish my foreman. I didn't say a word to him about it.

On September 16, 1955, I got to Durham in my automobile. It was driven by Howard McLeod. He did not work for Durham and Southern Railroad. I did not do any shopping that day in Durham. I did not know what I was signing that day. I did not have any curiosity about it. I thought I was just signing for my check; I just assumed that was what I was doing. It was at a different place from where I usually sign for my check.

I admit signing the personal injury report, but I don't remember when or what time it was signed. I just couldn't say if I knew what the personal injury report was at the time I signed it. I don't usually sign papers not knowing what they are.

Mr. McAllister didn't tell me anything about it; he didn't tell me a story about it. All he did was ask me how I was. On that particular day I didn't know about how long in the future, I still thought it was temporary. At that time I didn't know what it was that I was signing or I wouldn't have signed it. At that time Mr. McAllister didn't know what my disability might be in the future from my injury. He didn't make me any false representations. The only thing he did do there, he just didn't explain the paper to me. He didn't make any deceitful suggestions to me. He didn't make any fraudulent suggestions to me. He just put the paper down there and I signed it and got my check and left. I didn't think I was going to be hurting in the future.

Redirect examination:

The $144.60 that I received there from Mr. McAllister was not for injuries. That was my pay check.

[fol. 41] Mr. Nye or Mr. McAllister said I had to sign a full release before they could pay me anything or give me my job back. That was the last visit I had with them, but I don't remember what date that was. It was during the year 1956.

I do not have a typewriter. I do not ever type out reports at all. I do not see any date on this report of the accident. (Witness is looking at accident report identified by defendant.) I do not know when this report was made out. I do not know when Mr. Tillerson made out

any report, if he made out one. I don't recall now. I don't remember if Mr. Tillerson brought the report for me to sign. I don't remember if the report was typed or made out for me to sign. I don't remember if Mr. Tillerson asked me any questions about it when it was signed. I do not have a recollection of there being any underscoring of words or phrases on the paper when I saw it. I did not furnish Mr. Tillerson with the name of Walter Covington. I do not remember whether I knew Walter Covington or not. I never did work with Mr. Parrish's men. I do not remember having ever given the name of Walter Covington to Mr. Tillerson at any time. I do not remember having given the name of Eugene White to him. I do not remember having given the name of Freddie Williams to him. I do not know how long it was after my injury that I signed the paper.

The last time I talked to Mr. McAllister was when we had the meeting in his office, but I don't remember the date. It was the time when the matter came up with respect to my signing a full release. I have not talked with him since that time.

I do not know who Nello L. Teer, Jr. is. I did not ever have any conversation with him. To my knowledge he was never present at any time when I had any conversation with Mr. Nye, Mr. McAllister, Mr. Holder, Mr. Parrish or any of the persons connected with the Durham and Southern Railway Company. I do not know Mr. B. F. [fol. 42] Coble; I did not ever see him to know him. I do not know Mr. A. J. Harris. I have not seen him to know him. I do not recall knowing W. S. Jones. I don't know Charles Phelps or E. Sweaney Jackson. The last three names above were not on the paper that I know of, that I signed in Mr. McAllister's office on September 17, 1955. I don't remember any names being on there, but I didn't read it.

B. F. Bailey testified:

I live on Highway 55 near Carpenter's Station. I have lived there twice. I own my ony farm there and moved away from there, moved there in 1929 and stayed until 1937, then moved to Apex, and then in 1954 I moved back to where I live now. I have been employed by the Dur-

ham and Southern Railway Company, but I am retired now. I retired on September 15, 1958. I was employed by that railroad on August 22, 1955. I was employed as a Section Foreman for the section at Apex.

I knew Mr. Eugene Maynard, and I had known him since he came to Apex to work on the railroad. That was the first time I had ever seen him. He lived in the section house of the railroad. I knew nothing against him, we just worked together.

On August 22, 1955, I had the section at Apex. On that day I did not go to Dunn, N. C. I knew that Mr. Maynard was employed by the railroad on that day. I believe it was the following day when he came to the office and said that he had hurt his back or something, that I first learned about his getting hurt. I talked to Mr. Maynard, we were there together. Mr. Maynard was in the office of Mr. Tillerson. I think this was the following day but I am not positive.

On a latter date, I went to Durham with him. I don't know the exact date; I am sure it was after August 22, 1955. I can't say whether it was before or after September [fol. 43] 17, 1955. Mr. Maynard asked me something about it and then Mr. Tillerson also said it was all right for me to go with him. Mr. Tillerson said it was all right for me to go, they talked it over. I did not necessarily have to get permission from him, but I did it as a courtesy. I was a fellow worker, and, naturally, I would be interested in his seniority and job, to find out if there was any reason why I shouldn't. When I got there those present were Mr. Nye, Mr. Tillerson, Mr. Holder, and Mr. McAllister. Mr. Nye is the Railroad Attorney. That was the first day I ever saw Mr. Nye. I would see Mr. McAllister continually. Mr. McAllister is vice President and General Manager of the Railroad. I knew Mr. Holder previously; Mr. Holder is Auditor of the Railroad.

I recall that a lot was said that day, and I couldn't recall all of it. I remember Mr. McAllister said he would have to sign a release before he could pay him the money. The release was not signed at that time. We left there; Mr. Maynard left there.

(The Court: It is admitted that the Railroad was engaged in interstate commerce.)

I couldn't say how long it was after Mr. Maynard received the injury on the railroad before we went to Durham. I believe it was in 1956. It must have been in 1956.

After Mr. Maynard was injured, he worked with me. I can't tell you how long because, you see, a lot of times I was sent to other places. He was just with me part of the time. I don't think that he did any hard work. I didn't see him do any hard work. He was complaining of his back and he just helped me look after the men, did generally light work. He didn't do hard work, but I didn't understand that he was to do hard work before August 22, 1955. He complained of his back. I know that he wore a brace.

Cross-examination:

[fol. 44] I worked for the railroad for a little more than 40 years. During the last years I was Chairman of my local union. It was part of my job to see that the laborers with whom I was associated got a fair break.

I came to the meeting in the office of Mr. Nye on October 23, 1956, at the request of Mr. Maynard. I stated that I was there as a laborer's representative, and was just observing. I stayed there during the entire evening. I don't know just why Mr. Maynard wanted me to go with him, and I don't remember just what he said. Mr. Nye told Mr. Maynard at the meeting that he understood Mr. Maynard wanted to get a few things straighened out, and that the floor was his. I don't remember what his complaints were. I wouldn't know how to state in words any complaint he made. I wouldn't say that anyone coerced Mr. Maynard that night in Mr. Nye's office. No one was rude to him that night.

Mr. Maynard said a good deal about what Mr. Tillerson had done, the way he had treated him, but I don't recall all of what was said there. I remember something about Mr. Maynard getting up from his seat, and being mad when he was informed that he would not be paid after the first of September because the doctors had told him to report back to work on the first of September and he had failed to report back to work. I know that the policy of the company was that when anyone had been off and had come back to work they do not get their wages unless they sign the release. I knew that was the policy

of the Durham and Southern Railway Company ever since I have known anything about it. That is, you don't get your wages when you have been off from work unless you sign a release. You apply for pay through the retirement board when you are off sick. Concerning whether or not Mr. Maynard was abused or mistreated in the office of Mr. Nye that night, I don't think he was any more, don't think it was any worse on one side than on the other. I haven't known Mr. Maynard long enough to know his reputation one way or another, whether it is good or bad.

[fol. 45] Redirect examination:

It has been the policy of the railroad to have an employee to sign a release before he could get back wages. Likewise, if a man is injured he is called upon to sign a release when he gets his money. I don't know anything about whether the railroad ever paid Mr. Maynard for his injuries. I don't know if the railroad paid him any money after September 17, 1955. Back wages were talked about in the conference on October 23, 1956, in Mr. Nye's office. Mr. McAllister told Mr. Maynard, in the presence of Mr. Nye, Mr. Holder and the other officials of the Railroad, that night, that Mr. Maynard would have to sign a release. Mr. Maynard did not sign a release there. I didn't see any money paid to Mr. Maynard that night.

Recross-examination:

I don't remember if Mr. Nye told Mr. Maynard that he did not have to sign a release because he had already signed one release.

J. H. Parrish testified:

I live at Coats, N. C., and I am now employed by the Durham and Southern Railway Company. I have been employed by the railroad for 43 years and 5 months. I am now Section Foreman and have been since May 17, 1917. I went to work for them on November 15, 1915.

I know Mr. Eugene E. Maynard, and I got acquainted with him since he came on the Durham and Southern. I think that was in the spring of 1955. At that time I had a section at Dunn. Not long after Mr. Maynard was em-

ployed by the railroad I saw him. I know Mr. Maynard lived in the Section house in Apex. I don't recall just how long.

On August 22, 1955, my job was at Dunn. I was repairing tracks that day, putting in boards in the crossings. They were about 4¾ by 8 inches and about 12 feet long. [fol. 46] These timbers were brought down on a truck from Apex by Mr. Tillerson and Mr. Eugene Maynard. Mr. Tillerson was the Roadmaster. They arrived around 10:30, coming by a highway truck. My men unloaded the timbers. These timbers were used in the crossings.

Mr. Maynard was not requested to do anything until we went to load the motor car up on the truck. I asked Mr. Maynard to get up in the truck. At that time the motor car was on the ground at the crossing. It had been in Dunn at the railroad shop. It was Mr. Tillerson's motor car. Mr. Tillerson had brought the motor car to Dunn several days prior to that time. I don't know who told Mr. Maynard to get the motor car. I told Mr. Maynard to get in the truck and hold the handles of the motor car to keep it from rolling while the other men lifted it up and put it in. We went to load it, and the windshield on the frame of the motor car was a little higher than the top of the truck. The truck had a framed top covered with canvas, a wooden frame. It was some 46 to 48 inches from the bed of the truck. The windshield or something caught the top of the truck.

They took the motor car down and turned it around on the ground and put it into the truck the other way. Mr. Maynard was still in the truck. Three of the men picked up the car and set it up in the truck. The only thing I heard Mr. Maynard say was "wait a minute, don't shove it on me." He said "don't shove it on me." I didn't find out later that it was shoved on him. The car was handled in a safe manner. I did not know that Mr. Maynard was injured when the car was shoved on him. I never heard of that. I have heard of it before today. I first heard of it about two weeks after he claimed that he got hurt. I was working there at Dunn. I don't recall how long it was before he came back to Dunn but he did not come back there. I heard about his injury about two weeks afterwards. I had seen Mr. Tillerson. Mr. Tillerson didn't

mention it to me. I didn't know that Mr. Maynard wore [fol. 47] a brace, he told me he wore a brace sometime after that. He told me that he got hurt. He told me that he got hurt on that particular day. He said that he hurt his back. I have never seen the brace that he wore. When Mr. Maynard got up in the truck, with the top of the truck some 48 inches from the bed of the truck, he had to be in a bending-over position.

Cross-examination:

Walter Covington, Glynn White and Freddie Williams lifted the motor car up in the truck. Mr. Maynard did not have anything to do with the lifting of it. I told Mr. Maynard to get up in the truck before the lifting started. At the time it was being lifted he was in the truck. When they started putting it up in there the end with the windshield caught and I took it down and turned it around and put it in that way then. Mr. Maynard was in the truck all that time. He had nothing to do with the lifting of the motor car up and down. The same crowd lifted the second time. I told Mr. Maynard to get up in the truck and keep it from rolling back on the men if it should start back out. There was no guiding to be done to the motor car. The men rolled it up normally. Mr. Maynard made no complaint to me. Very likely I would have seen it if the men had rammed the motor car on Mr. Maynard. I was there. I didn't see it happen. I heard no complaint from him. It was something like two weeks after that I did hear about it. That was the first time that I heard about him having hurt his back.

Redirect examination:

Freddie Williams, Glynn White and Walter Covington were employees of the Durham & Southern Railroad, Those three men are still employed by the railroad.

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[fol. 48] Dr. A. E. Harer testified:

I live in Raleigh. I am a bone and joint surgeon and practice here in Raleigh, I have been so engaged for about 15 years. I received my medical education at the University

of Buffalo and the University of Michigan, Medical and Orthopedic. I am an orthopedic surgeon. I received an MD degree specializing in orthopedic surgery. Later, I did study at the University of Michigan and received from the Board of Physicians and Surgeons a special award in orthopedic surgery in 1951. Since 1951 I have specialized in that field. I practice here in Raleigh with all three hospitals in Raleigh. I am a member of the American Medical Society of Orthopedic Surgeons, National Board of Medical Examiners, Wake County Medical Society, Southern Medical Society, and perhaps some others. I am now practicing, specializing in orthopedic surgery.

(The Court finds the witness to be a medical expert and expert in orthopedic surgery.)

I had occasion to first examine Eugene E. Maynard on September 13, 1956. I will quote from my report as to his complaint at that time.

> "He still continues to have pains across the lower back and in the left leg. The pain is worse if he walks any distance. He has pain at times while sitting for prolonged periods. He does not have cough or sneeze pain except while lying down. Rest relieves his pain to some extent but after several hours of rest he begins to have a cramping type pain in the lower back and in the left leg. He is definitely dependant upon his brace. Riding in an automobile is painful. He does not describe any pain with bowel movements. He is never completely free of pain. He complains of definite numbness in the left leg; the leg feels heavy and weak and he feels that he still has a tendency to turn his ankle on uneven ground because of weakness in the ankle. He is not complaining of any bowel or urinary [fol. 49] disturbance. The only time that Mr. Maynard takes medication for his pain is at night. He is taking a prescription supplied by Dr. Goodwin. Any effort to bend or lift starts a stinging sensation in his back which then becomes a cramp in the back and in the left leg. He is not complaining of any symptoms in the right leg."

The examination of September 13, 1956, was a pertinent examination of Mr. Maynard's back and legs, and my findings were as follows:

> "Mr. Maynard tends to sit leaning to the right. He moves about with great effort. He holds the back in a rigid position at all times. At no time during the examination was he observed to voluntarily flex the spine. In the erect position the shoulders and pelvis are level. The spine is straight. There is actually an accentuation of the lumber curve. Forward flexion is limited to what seems to be about 20%. Extension is practically absent. Right and left lateral bending are limited. All these motions are apparently painful. There seems to be rather severe localizing tenderness over the lumbo sacral joint, in the left sciatic notch and along the course of the sciatic nerve in the thigh. There is no visible atrophy of the lower extremities. The left calf measures perhaps one-quarter inch smaller. Straight leg raising is positive bilaterally for low back pain but more especially on the left. The reflexes appear equal. There seems to be a definite decreased sensation to pin-prick over the lateral foot and lateral calf. However, there is some apparent change in the entire leg with respect to sensation. The peripheral pulses seem adequate. All motions in the left lower extremity seems weaker but the extensor of the first toe is not necessarily weak. He seems to have trouble walking on his heels and toes and this is difficult to evaluate. Pressure over the lumber spine is said to be very painful. The chest [fol. 50] expansion is one and a half inches."

When I stated that forward flexion is limited to what seems to be about 20%, I meant that he cannot bend. Right and left lateral bending is leaning to either side with the knees straight. The lumbo-sacral joint is the joint at the small of the back just below the level of the waist-line. (Indicating on his body.)

The pin-prick test is to see if the patient has a loss of sensation and has reference to whether or not there is pressure on the nerve in his back, whether loss of feeling when

tested by the stroke of a pin in the involved leg. Mr. Maynard had dullness with respect to the pin prick in the lateral or outside border of the calf of his foot on the left leg. The result of pressure on the lumber spine was apparently very painful. There is a causal connection between pressure on his back and also the pin prick to the left leg. If there is any pressure applied to the nerve which runs to the leg, any pressure applied to the nerve will result in weakness and loss of sensation and wasting of the leg and sometimes reflex changes. At the time I examined Mr. Maynard on September 13, 1956, I formed an opinion at that time that these symptoms and findings were permanent in nature. I also formed the opinion that surgery should not be recommended at that time to correct this condition. I have re-examined Mr. Maynard since September 13, 1956, and my opinion has not changed substantially.

I have an opinion satisfactory to myself, based upon my experience and knowledge and examination of Mr. Maynard that these conditions would impair his capacity to work. I think that he probably demonstrates a permanent partial impairment of about 15% of the spine. I cannot say what his future course will be except to say that after this length of time he probably will continue to have back difficulty and leg difficulty. I can say that wearing a brace should [fol. 51] be helpful to the patient in his type of case. The last examination I made on Mr. Maynard was on April 18, 1959, some three or four days ago. My original opinion that I have previously stated had not changed after that last examination.

Cross-examination:

I first saw Mr. Maynard in September of 1956. To my knowledge I was not in possession of the reports of any other doctors that had examined him prior to that time. I know what he told me concerning treatment and other examinations that he had undergone. To my knowledge I did not have any doctors' reports. In April of 1959, in the pin-prick test, I found that the numbness seemed limited to the outside quarter of his left foot.

Redirect examination:

On the occasion of the last two examinations it was my opinion that Mr. Maynard demonstrated a half-inch of wasting of the left calf of his leg. This could be tied in with pain in the lower back.

Recross-examination:

I don't know but what that leg was always smaller than the other one. It is not uncommon to find that one leg is a half-inch smaller than the other. There seemed to be a little bit more difference in measurement between the two legs in April of 1959 than in September of 1956, but I could not answer that unequivocally because it is difficult to measure.

I have an opinion, but I haven't given it much thought as to whether or not some of Mr. Maynard's trouble would be functional. I don't believe that it is functional.

. . . . . .

[fol. 52] DEFENDANT'S EVIDENCE

FREDDIE WILLIAMS testified:

I am employed by the Durham and Southern Railroad, and have been so employed for 12 years. I am a laborer on the maintenance right-of-way, and my home is in Dunn, N. C.

I know Mr. Eugene E. Maynard, and I was with him and some others on August 22, 1955, at Dunn. I heard the testimony concerning the place and time where a certain motor car was loaded onto a truck at Dunn. I was present and helped load the motor car. Mr. Jack Parrish and Mr. H. L. Tillerson were in charge of loading the motor car, and Eugene and Walter Covington and I picked up the motor car. To my recollection Mr. Maynard did not help pick it up. To my recollection he did not put his hands on it. The first time we picked it up the windshield part wouldn't go under the top of the truck. We tried to put it in with the windshield in front first, and then had to take it back to the ground. Walter, White and

myself lifted the motor car. Walter Covington, Eugene White and I turned it around and lifted it up. I was at the back picking that up alone and then Walter and White [fol. 53] assisted me. The end away from the windshield went in first. No one except Walter and White assisted me. We placed the front two wheels in the rear of the truck, and I believe Mr. Maynard was standing in the truck to keep it from rolling back when we attempted to pick it up. After the two front wheels were in the truck, Walter and Eugene came around to the rear to help me. I held the rear alone while they were coming around. I do not recall the car slipping or rolling.

The three of us then picked it up level and rolled it into the truck. We did not make any sudden movement. To my recollection the motor car did not slip or slide, and did not hit Mr. Maynard. Mr. Maynard did not complain to me about being hit. I was there and saw everything.

The body of the motor car was not as long as the truck bed. The windshield of the motor car stuck outside of the top of the truck after we pushed it in. I don't know how much room there was between the front end of the motor car and the back end of the truck bed. I don't think the motor car rolled away from the back of the truck.

* * * * * * *

[fol. 54] WALTER COVINGTON testified:

I was present at the time and place where the motor car in question was loaded on the truck at Dunn, and I helped load it. I was on the right-hand side, Eugene White on the left, and Freddie was at the rear—the end away from the truck. I and Eugene at the front and Freddie at the back of it put the two wheels up and then Eugene White and myself taken the safety precaution to roll it—and we placed it in the truck. We then walked around [fol. 55] to the back to help Freddie. We went to the back and taken the same precaution, just rolled it in right easy. Mr. Parrish asked Mr. Maynard to get up in the truck and he got up in the truck and we rolled it right back there right easy and after we got it loaded we started to our dinner and Mr. Maynard said he would eat his dinner

while he was in the truck. Mr. Maynard was not hit by that motor car when we pushed it. I saw Mr. Maynard. I did not hear Mr. Maynard complain about being hit with the motor car. We unloaded the motor car after we found the windshield wouldn't go back in there, and then we loaded it again. Eugene White and Freddie and I loaded it back again. I started with the Durham and Southern Railroad 25 years ago the first of September. I got hurt one time when I was loading crossties while working for the Durham and Southern Railway. I sprained my knee and kept right on working.

* * * * * * *

[fol. 56] Eugene White testified:

I have been working for the Durham and Southern 11 years and eight months, and I was working for them on August 22, 1955. I was present at the time the motor car was loaded on the truck at Dunn. Mr. Tillerson and Mr. Maynard came up with the truck and Walter Covington, Freddie Williams and I picked it up and put it up there, then took it down and turned it around and put it back in there. Mr. Maynard did not help lift. The first time we put it up the windshield caught, so we took it down and turned it around and put it in again. Right after we turned it around and put it in, Mr. Maynard said he would eat his lunch there in the truck. He did not help put the motor car in the truck. He did not lift the motor car at any time. The motor car was loaded carefully. I don't know that the motor car hit Mr. Maynard while it was being put in the truck. I was there. I did not hear Mr. Maynard complain in any manner about the motor car hitting him while being loaded.

* * * * * * *

[fol. 57] H. L. Tillerson testified:

I am H. L. Tillerson, and have been employed by the Durham & Southern for 17 years. On August 22, 1955, I was present when the motor car in question was loaded on a truck at Dunn.

I got ready to leave and Mr. Parrish was to have my motor car loaded on the truck so I could take it back to Apex, so he instructed his men to load the car on the truck. Those present were Mr. Parrish and myself, Mr. Maynard, Walter Covington, Eugene White and Freddie Williams, and these last three rolled the car right up to the back of the truck, took the tailgate out of the truck and Walter Covington, Freddie Williams and Eugene White got around the motor car and picked it up and started to put it in the truck but the windshield lacked three inches of going under the canvas top of the truck so they sat it back down, turned it around the other way. Walter Covington, Freddie Williams and Eugene White were the only ones lifting it. Walter Covington was on one side, Eugene White on the opposite side and Freddie Williams at the rear.

[fol. 58] They picked it up again and put it in the truck until the windshield hit the top again which made the entire motor car in the truck under the canvas, put the tailgate back in place and stopped right there. The motor car was not longer than the bed of the truck. On the second attempt to put the motor car in the truck, Mr. Maynard, instructed by Mr. Parrish, took hold of the handles of the car in the truck. The motor car did not slip or roll back. It did not lurch suddenly. I could see everything that was going on. The motor car couldn't hit Mr. Maynard. Mr. Maynard did not complain to me that day about an injury.

We got the car loaded at 11:55 o'clock, ate lunch, and then left. I was in Mr. Maynard's presence until 1:30 o'clock; we drove back to Apex. I did not know during that ride about him having been injured. The following day at about 11 o'clock Mr. Wilson told me about the injury. I talked to Mr. Maynard on the track near Durham, and he told me about hurting his back. He said he must have hurt it loading the car at Dunn. That he felt a little stinging in his back and didn't do anything else during the day that could have hurt him.

I later made out an injury report in my office at Apex. Mr. Maynard was present when it was made out and answered the questions. It was typed out when he was present. We met in my office at 4 o'clock P.M. to make out the report and I asked him if he would like it made out

on the typewriter and he said that he would appreciate that, so I made three copies. I read each question to him and he would answer it. I then typed in the answers and read back every question and answer to him and he signed it. None of the questions or answers have been changed since that date.

The underlining was done yesterday by Mr. Nye. Mr. Maynard stated that all the answers to the questions were proper. (Mr. Tillerson then read into evidence the report personal injury form, Defendant's Exhibit No. 1.) [fols. 59-61] I don't know whether or not Mr. Maynard finished working after we got back to Apex at 1:30 on the day of the accident or not, but he was supposed to have. He wasn't complaining at all that day. That is August 22nd. The accident report is dated August 23rd. I saw Mr. Maynard sign the accident report. I previously told Mr. Nye the same thing I am telling in Court today.

. . . . . .

[fol. 62] H. A. McAllister testified:

I am H. A. McAllister, Vice President and General Manager of the Durham and Southern, and have been with them for eight years.

I saw Eugene E. Maynard on September 17, 1955, in my office. This was not a regular working day, and Mr. Maynard would not have to report in Durham for his wages. He received his regular check in Apex. Apex workers did not have to come to Durham to get their wages.

On September 17, 1955, Mr. Maynard stated that he wanted to know if the company could pay him for the time he was off and if we would he was ready to sign a release. [fol. 63] He said he was feeling much better, and thought he was going to be all right. This is the only way I had of knowing how he felt. I had not contacted him prior to that date personally concerning his wages or a release. Mr. Maynard stated that he would like to settle up with the company, that he was broke and needed some money, and I told him at that time that he knew if we settled up with him it would be necessary for him to sign a release. He said he was willing to sign a release. He stated that was the purpose of his visit. I am acquainted with his signature, and I saw him sign his name on September 17, 1955.

The signature on the release is his signature. The form was above his signature before he signed it.

I told Mr. Maynard that if he was agreeable to sign the release that I would pay him for his time lost and asked him if he had applied for benefits and he told me that he had not. I explained to him what was in this release. I explained this to him in detail. He asked me if he didn't get all right what would happen to him and I told him that it had always been the policy of the Durham and Southern to take care of its employees, and I could see no reason why he should be an exception. I kept his job open for him after that.

I did not promise him any future payments if he would sign the paper, except that possibly we would take care of his doctor's bills if he had any. We did take care of his future doctors' bills. I made no other promises to him. He came to my office for the specific purpose of signing the release. All of the blanks in the release had been completed by my clerk on Friday, because the Clerk doesn't work on Saturdays.

(The witness then read the entire release, Defendant's Exhibit No. 2.)

The blank on the release is for my signature, and Mr. W. S. Jones signs it for the President of the road, and B. [fol. 64] F. Holder signs it on the other side, and it is approved by Mr. R. L. Holder as Treasurer and General Auditor, and Mr. B. F. Coble, checked it and certified that it was correct, and the signature of Clara J. Harris is as voucher clerk. These signatures are for administrative purposes.

There are few people working on Saturdays. Mr. Phelps and Mr. Jackson, Traffic Department employees, were in an adjoining room, and when Mr. Maynard signified that he was ready to sign the release, I called these gentlemen in, introduced them to Mr. Maynard, and told them he had been hurt and he is settling with the company, and told them I wanted them to witness his signature, which they did. Mr. Maynard told them that that was his signature. Charles Phelps is still with the company, and Jackson is no longer with the company.

After Mr. Maynard signed the release and it was witnessed by Phelps and Jackson, I gave him a bank draft.

This was subsequently cashed. To my knowledge Mr. Maynard has never attempted to return that money. While Mr. Maynard was in my office I didn't use any duress, force or any misrepresentation or any other element of fraud concerning this release in my discussion with him. I did not have my hand on the release when he signed it. I entered into this agreement for the railroad on good faith. Based upon the representation made by Mr. Maynard. I do not know the facts as to whether or not he was actually injured on the railroad.

I have been with the Durham and Southern for eight years. Prior to that I was with the Seaboard Air Line Railroad. I have been in Durham eight years.

I am familiar with the personal injury form. When an employee is allegedly injured on the Durham and Southern Railroad, this form is required to be filled out by the employee or his foreman.

(Defendant then offered into evidence the report personal injury form, Defendant's Exhibit No. 1, and the [fols. 65-67] release, Defendant's Exhibit No. 2.)

Cross-examination:

I received prior to September 17, 1955, a report that Mr. Maynard had received an injury. I have the report with me. The only other report I got was a verbal report. The report in evidence was received by me through mail some three or four days after Mr. Maynard's injury.

* * * * * * *

[fol. 68] Dr. James S. Wilson testified:

I am Dr. James S. Wilson, of Durham, N.C. I am a surgeon, and have been since 1946. I am a graduate of Duke Medical School, and I had five years of training fol-
[fol. 69] lowing that. I am licensed as a physician and surgeon in this State.

(The Court finds that the witness is qualified to testify as a medical expert.)

I examined Mr. E. E. Maynard on or about September 12, 1955. I first saw him on 8/25/55 in my office; at that time he stated that he had, three days previously been

lifting a motor car, sudden severe pain in his back; that he kept on working and later on during that day in lifting two cans of paint had a re-occurrence of pain; that this pain had persisted and he came to my office for treatment for that.

On examination at that time he did have considerable tenderness and muscle spasms over the lower back and in a test we call a straight leg test it signified acute muscle straining of his back. At that time there was no evidence of any bone injury and no neurological changes. He was given supportive treatment by strapping his back and advising him to go to bed on a firm felt mattress.

I saw him again four days later, at which time he was improved but still having pain; examination of him at that time showed persistent spasm, and he was referred back home to continue his rest and strapping of his back.

I saw him again on the 6th of the following month, about a week later; at that time he was still having considerable spasm and pain but there was definite improvement, and at that time we started him on physiotherapy, that is, heat and massage by a registered physiotherapist. Three days later he was still having some pain but was markedly improved. We continued physiotherapy and was referred or sent back to work rather on the 12th of that month, September 12. He was seen again three days after going to work and there was still continued improvement; he was doing only light work, sent him back not to regular work, not heavy work, but to light work. He was seen again a week after that on the 23rd of September, at which time he stated that he was still having pain. That he felt all right in the morning, but after [fol. 70] riding a car to work and riding a motor car, he had recurrence of his back pain. Examination at that time showed much improvement as far as the muscle spasms were concerned. At that time was the first time I found any sensory changes, paresthesis of the left thigh. That was the 23rd. He was given aspirin and a quarter-grain of codeine for medication. I don't have a record of the first time I prescribed that. That is a mixture of aspirin and codeine, to take one or two tablets as often as every four hours if necessary for pain. That type of drug does not interfere with your mental capacity.

Since his condition had not improved as rapidly as one would expect with a similar acute back sprain and with the beginning of paresthesia, a corset was prescribed and he started wearing that with improvement. He was seen then at about weekly intervals and with continued pain but some improvement; one day there would be an improvement and the next he would still have pain a little more pain. I recommended that during this period he continue his work.

He was seen again on November 4th, at which time his back was much better so that he could walk without pain, but the corset was causing some pressure on his abdomen so that he was experiencing a bit of discomfort, but his back was feeling much better at that time. Then I didn't see him again until in March of 1956, when he complained that he was still having pain, particularly on bending, and was having more pain down his left leg, sensory change. At that time his reflexes were normal and I felt at that time that he probably had a small ruptured disc, a small lumbar disc, and referred him to Dr. Bugg, an orthopedic consultant. I discussed it with him later, Dr. Bugg, Dr. Lockhart, and Dr. Odom's findings, discussed that with Mr. Maynard, but that was later and not at this time. That was in September of 1956. In talking with Mr. [fols. 71-74] Maynard in September, on September 7, I believe that was 1956, I discussed with him that our findings indicated he did have a ruptured disc, although this was of a mild degree in that it was not demonstrable by x-ray or by special myelographic x-ray studies to show any protrusion of a disc causing pressure on a nerve root, that Dr. Lockhart, Dr. Bugg, Dr. Odom, and myself had all had a consultation together in reference to Mr. Maynard and we felt that there was insufficient indication of a positive nature that would warrant any surgical intervention, that although he did have mild disc symptoms we felt that in this type of situation he would be better at his work wearing a support or corset.

We recommended that he continue his type of work as a foreman and that insofar as possible he should be assigned to a place where he would not have long rides in a motor car over rough roads.

When I examined him on September 15, 1955, I did not think he had any permanent injury. At that time I thought

his injury was primarily a muscle spasm. I recommended that he continue his work as a foreman.

I felt that the paresthesia, the sensory changes that he had, were inconstant, inconsistent, that they did not actually follow organic nerve patterns, and felt that there was a psychopathic or functional overlay associated with his injury. That means that there is a certain mental part of the pain, not a true or organic pain, but that he thought he was having more pain than actually we could demonstrate cause for. In other words, you might say that he was exaggerating his pain but that the exaggeration may be in his subconscious, but I wouldn't say, but I don't think that he was actually exaggerating his pain but that he was having less pain than he thought he was having. That is a hard point to explain.

. . . . . .

(Here follow 3 Exhibits, side folios 75, 76 and 77)

[fol. 75] Defendant's Exhibit No. 1 **50A**

REPORT PERSONAL INJURY

Line of Road on which accident occurred Durham and Southern RY Co. Railway

Place of accident Dunn, N.C. Date of Accident August 22, 1958 19

1. Injured person's name E.E.Maynard Color or Nationality White Age 37
2. Residence Apex, N.C. Street
3. Employee, Passenger, or what? Employe Married or single? married Number of children 3
4. Employed as Appr.Foreman Term of service 8 mo. How long present occupation. 5 Mo.
5. Nature and extent of injuries (show whether right or left hand, arm, or side)

Strained back

6. In what manner was person injured? Give full particulars Loading motor car in truck

7. Was injured person familiar with duties? yes

Was he in charge of machinery or appliance causing accident; if not, who? [redacted]

Was machinery, appliance or equipment in proper working order? yes

10. What was done with injured person? Continued to work rest of day

If taken home, address

If to hospital, name and location

11. What physician called? Dr.O.S.Goodwin Address Apex, N.C.
12. Probable period of disability None is expected
13. If injured coupling, who gave signal?

If injured between cars, give initial and No.

15. Were cars equipped with grabirons?
16. What was said by injured person as to cause of accident? Lifting motor car into truck and felt a sting in back
17. Give name and address of witnesses, or anyone who can give information relative to accident:

Name J.H.Parrish	(Color W)	Address Dunn, N.C.	Street
Name Walter Covington	(Color C)	Address Dunn, N.C.	Street
Name Freddie Williams	(Color C)	Address Dunn, N.C.	Street
Name Eugene White Sm	(Color C)	Address Dunn, N.C.	Street
Name	(Color)	Address	Street
Name	(Color)	Address	Street
Name	(Color)	Address	Street

18. Carefully inspect tools, machinery, cars, motors, etc., causing injury, giving full detailed report of conditions

19. If struck by any object, give distance from nearest rail
20. If struck by overhead object, were warners in good condition?
21. If any violation of rules, give rule number None
22. Was equipment causing accident properly handled? yes
23. Was accident result of an injured person's carelessness? No
24. Was injured person in proper place when injured? yes

RE[illegible]VED AUG [illegible] 1961 OFFICE OF THE CLERK SUPREME COURT, U.S.

E. E. Maynard Conductor or Foreman

Train No. Station Date of report

50B

[fol. 76]

[illegible] FORM NO. [illegible]

DURHAM AND SOUTHERN RAILWAY COMPANY

ACCIDENT REPORT

August 22, 1960 19

To Mr. E. .. [illegible]

Dear Sir—Below please find report of accident:—

1 Date 19 Hour Train

2 Direction of train Speed ... passenger or freight

3 Milepost and nearest station

4 Curve or straight line Weather

5 Track blocked M. Track cleared M.

6 Motor No. Motorman

7 Conductor Fl man or Baggagemaster

8 Brakeman

9 Number of airbrake cars in train Number of non-air cars in train

10 If train broke in two state whether between air or non-air cars

11 Passenger trains detained by accident—give number of each train so detained

12 Damage to Locomotive

13 Damage to cars

14 Damage to track

15 If contents of cars are transferred, give initial and number of car transferred from and transferred to in each case, and extent of damage to contents, if any

REMARKS—Give full particulars as to how accident occurred

Conductor or Foreman

NOTE—This report must be made out and sent to the head of your department, also a copy to Claim Agent of the Division, immediately after each accident. In the case of personal injury, use reverse side of this form.

50C

[M.77]
YB-NFH

DEFENDANT'S EXHIBIT No. 2

Form 39

DURHAM AND SOUTHERN RAILWAY COMPANY

RELEASE

SEP 20 1955

E. E. Maynard

Address apex, N.C.

For Auditor's Use
Number 59
Month September 1955
File

KNOW ALL MEN BY THESE PRESENTS, That for and in consideration of the sum of One hundred forty-four dollars and sixty cents ---- ---------- Dollars, ($144.60) to me in Hand paid by the DURHAM AND SOUTHERN RAILWAY COMPANY, the receipt whereof is hereby acknowledged, I, E.E.Maynard do hereby release and forever discharge the DURHAM AND SOUTHERN RAILWAY COMPANY, its successors and assigns, from all claims, demands, actions or rights of action, of every nature whatsoever, now existing, or hereafter to arise, on account of, or in connection with Personal injuries received at Dunn, N.C., on Monday, August 22, 1955 while assisting Mr. Parrish's section force in loading a track motor car on a company road truck.

at or near Dunn, N.C. on or about the 22nd day of August 1955, and all results attending or following, or which may hereafter arise therefrom.

Deft- (22) 2

This release is fully understood by me (us), constitutes the entire agreement between the parties hereto, and is executed solely for the consideration above expressed, without any other representation, promise, or agreement of any kind whatsoever.

Given under my hand and seal at Durham, N.C.

this the 19th day of September 1955

WITNESS J. Chas Shelly E. E. Maynard (Seal)

WITNESS E. J. Swaney Jackson (Seal)

DISTRIBUTION		
274 - $144.60	H. A. McAllister Claim Agent	Audited R. E. [illegible] Assistant General Auditor
761-Claim Agents Drafts H. A. McAllister to E. E. Maynard $144.60	Approved	Approved
	Approved Chief Claim Agent	Correct B. F. C[illegible]
	Approved	Examined
	Approved W. F. Jones President	Registered Clara Harris Disbursing Clerk Voucher Clerk

[fol. 78] IN THE SUPREME COURT OF NORTH CAROLINA,
FALL TERM, 1959

No. 453—Wake

EUGENE E. MAYNARD,

v.

DURHAM AND SOUTHERN RAILWAY COMPANY

OPINION—JANUARY 29, 1960

Appeal by plaintiff from Williams, J., 2 April Regular Civil Term 1959 of Wake.

This is a civil action instituted pursuant to the provisions of the Federal Employers' Liability Act, by the plaintiff, an apprentice railroad section foreman, against his employer, Durham and Southern Railway Company, to recover for personal injuries allegedly sustained on 22 August 1955 while assisting in the loading of a motorized track car into the rear of one of the defendant's trucks in Dunn, North Carolina.

The evidence tends to show that shortly before noon on the date in question the plaintiff and three section laborers were instructed by the defendant's roadmaster, Mr. Tillerson, to load a two-man motorized track car into the rear of the defendant's ton and one-half truck which was parked near the crossing. The truck on which the car was to be loaded was an ordinary flat body truck with a canvas top supported by wooden ribs. The distance between the bed of the truck and the ribs supporting the canvas top was about three and one-half or four feet.

The plaintiff was instructed by the defendant's section foreman, Mr. Parrish, to get up in the bed of the truck and catch the end of the track car when the other men lifted it, to keep it from rolling back on the men who were lifting it into the truck. When the plaintiff got into the bed of the truck, the three section laborers, according to plaintiff's testimony, suddenly and without warning shoved the track [fol. 79] car into the truck, without giving him an opportunity to move out of the way. Plaintiff testified: "When I was in the truck, I was in a stooped position. I couldn't straighten up for the top of the truck. Then they shoved the thing in on me * * * catching my legs across the bottom

frame of the car and the iron of the motor car caught me in the chest and my back because it was against the top braces * * *. When the truck was pushed in on me and I was caught between it and the top, I felt a sharp, stabbing, sickening pain in the small of my back, and it kind of cut my wind off there for a minute, and then they released the car and I got out and it kind of eased off after a little bit until I started to step back and then I had the same pain again * * *."

The plaintiff's foreman, J. H. Parrish, who directed the loading of the track car, was used by plaintiff as a witness. This witness testified: "The only thing I heard Mr. Maynard say was 'wait a minute, don't shove it on me.' * * * The car was handled in a safe manner. * * * The men rolled it up normally. Mr. Maynard made no complaint to me. Very likely I would have seen it if the men had rammed the motor car on Mr. Maynard. I was there. I didn't see it happen. I heard no complaint from him. It was something like two weeks after that I did hear about it. That was the first time that I heard about him having hurt his back."

The evidence further tends to show that the plaintiff made and signed an accident report on 23 August 1955 in which he answered the question as to the "Probable Period of Disability: None is expected." He likewise answered the question, "Was equipment causing accident properly handled? Yes."

On cross-examination the plaintiff testified, "I didn't expect any permanent disability at that time. I just thought it was a mild back strain that I would get over within a few weeks or a month. When I signed it (the accident [fol. 80] report) with the answer to the probable disability, 'None,' I meant it at that time. * * * The accident happened on August 22, 1955. * * * I reported back to work on Tuesday, the 23rd of August, and worked all day that day * * *. On the next day I went to see the doctor * * *."

The plaintiff first went to see Dr. Goodwin in Apex, North Carolina, and later to see Dr. Wilson, the company physician at Durham, as well as other doctors, and took heat therapy treatment at Duke Hospital. None of the doctors prescribed anything for the plaintiff except a brace, which Dr. Wilson prescribed.

Plaintiff's evidence also tends to show that it was the policy of the defendant, when an employee sustained an

injury and did not work, when he returned to work he was paid his back wages in full, as though he had put in full time, if he would sign a release.

On Saturday, 17 September 1955, the plaintiff went to Durham, North Carolina, to see Mr. H. A. McAllister, Vice President and General Manager of the defendant company. Mr. McAllister testified that "Mr. Maynard stated that he wanted to know if the company could pay him for the time he was off and if we would he was ready to sign a release. He said he was feeling much better, and thought he was going to be all right." Whereupon, the plaintiff signed the following release:

"Know All Men by These Presents, That for and in consideration of the sum of One Hundred forty-four dollars and sixty cents—Dollars ($144.60), to me in hand paid by the Durham and Southern Railway Company, the receipt of which is hereby acknowledged, I, E. E. Maynard, do hereby release and forever discharge the Durham and Southern Railway Company, its successors and assigns, from all claims, demands, actions or rights of action, of every nature whatsoever, now existing, or hereafter to arise, on account of, or in connection with personal injuries received at Dunn, N. C., on Monday, August 22, 1955, while assisting [fol. 81] Mr. Parrish's Section force in loading a track motor car on a company road truck at or near Dunn, N. C. on or about the 22nd day of August, 1955, and all results attending or following, or which may hereafter arise therefrom.

"This release is fully understood by me, constitutes the entire agreement between the parties hereto, and is executed solely for the consideration above expressed, without any other representation, promise, or agreement of any kind whatsoever.

"Given under my hand and seal, at Durham, N. C., this the 17th day of September, 1955.

/s/ E. E. Maynard (Seal).

Witness: /s/ J. Chas. Phelps,
Witness: /s/ E. Sweeney Jackson. (Seal)."

In connection with the above release, the plaintiff testified, "That is my signature on that release to the Durham and Southern Railway Company dated the 17th day of

September, 1955. I signed it. Mr. McAllister was very nice all the way through. * * * He didn't tell me at the time that I was signing a release. * * * I didn't try to read this release. He didn't give me a chance to read it. I didn't ask him to let me read it. This wasn't the kind of thing that I would sign for my regular pay check. I didn't know what it was. I just did not give it no (sic) thought. I have a tenth grade education. I would have to say that I was not rational that day. I didn't know what I was doing that day. (He had testified earlier that he had been taking some pills to relieve his pain.) * * * Mr. McAllister didn't tell me anything about it. All he did was ask me how I was. * * * I didn't know what it was that I was signing or I wouldn't have signed it. * * * At that time Mr. McAllister didn't know what my disability might be in the future from my injury. He didn't make * * * any false representations. The only thing he did do there, he just didn't explain the paper to me. He didn't make any deceitful suggestions to me. He didn't make any fraudulent suggestions to me. [fol. 82] He just put the paper down there and I signed it and got my check and left. I didn't think I was going to be hurting in the future."

Before signing the release set out hereinabove, the plaintiff returned to work on 12 September 1955 and continued to work for the defendant until 16 May 1956. The only medical testimony offered by the plaintiff was that of a physician who first examined him on 13 September 1956, who testified, among other things: "I think that he probably demonstrates a permanent partial impairment of about 15% of the spine. I cannot say what his future course will be except to say that after this length of time he probably will continue to have back difficulty and leg difficulty."

At the close of the plaintiff's evidence the defendant moved for judgment as of nonsuit. The motion was denied. The defendant introduced its evidence and renewed its motion. The motion was allowed. The plaintiff appeals, assigning error.

William T. Hatch, Samuel H. Johnson, Wiley F. Mitchell, Jr. for plaintiff.

Charles B. Nye, Clem B. Holding for defendant.

Denny, J. The defendant concedes that probably the evidence offered by the plaintiff in the trial below was sufficient to take the case to the jury had the plaintiff not

signed the release set out herein, which the defendant pleaded in bar of his right to recover. Therefore, the question for determination is whether or not the plaintiff's evidence in support of his allegations that the release was without consideration and wrongfully procured by means of fraud and duress, was sufficient to warrant its submission to the jury.

It was admitted in the trial below that the defendant was engaged in interstate commerce at the time of the alleged injury. Likewise, it is conceded that this case is governed [fol. 83] by the Federal Employers' Liability Act, 45 U.S.C.A., section 41, et seq., and by applicable principles of common law as interpreted and applied by the federal courts. *Chesapeake & O. R. Co.* v. *Kuhn*, 284 U.S. 44, 76 L. Ed. 157; *Rickets* v. *Pennsylvania R. Co.*, 153 F. 2d 757, 164 ALR 387.

The appellee contends that the release under consideration cannot be set aside except by evidence which is clear, strong, and convincing, citing *Clements* v. *Life Ins. Co. of Virginia*, 155 N.C. 57, 70 S.E. 1076; *Callen* v. *Pennsylvania R. Co.*, 162 F. 2d 832, affirmed 332 U.S. 625, 92 L. Ed. 242, while the appellant contends that only the preponderance or greater weight of the evidence is required, citing *Dice* v. *Akron C. & Y. R. Co.*, 342 U.S. 359, 96 L. Ed. 398.

We have found nothing in the federal decisions at variance in this respect with our own decisions.

In this jurisdiction, if the action is to set aside an instrument allegedly procured by fraud or undue influence, the burden of proof to establish such allegation is by the preponderance or greater weight of the evidence. On the other hand, if the action is to reform an instrument, the evidence must be clear, strong, cogent, and convincing. *Walters* v. *Bridgers*, 251 N.C. 289, 111 S.E. 2d 176; *Henley* v. *Holt*, 221 N.C. 274, 20 S.E. 2d 62; *Ricks* v. *Brooks*, 179 N.C. 204, 102 S.E. 207; *Bolich* v. *Insurance Co.*, 206 N.C. 144, 173 S.E. 320.

In *Ricks* v. *Brooks*, *supra*, it is said: "In an action for reformation it must be alleged and shown, by evidence clear, strong, and convincing, that the instrument sought to be corrected failed to express the true agreement of the parties, because of a mistake common to both parties, or because of the mistake of one party induced by the fraud or inequitable conduct of the other party, and that by rea-

son of ignorance, mistake, fraud, or undue advantage something material has been inserted, or omitted, contrary to [fol. 84] such agreement and the intention of the parties. *Ray* v. *Patterson*, 170 N.C. 226; *Newton* v. *Clark*, 174 N.C. 393. But this rule does not apply where the purpose is not to reform, but to set aside the instrument for fraud, undue influence, or upon other equitable ground."

The plaintiff alleges lack of consideration in the procurement of the release involved herein. It is generally held in this and other jurisdictions that the mere inadequacy of consideration alone is insufficient to set aside a release. *Ledford* v. *Ledford*, 229 N.C. 373, 49 S.E. 794; *Watkins* v. *Crier*, 224 N.C. 339, 30 S.E. 2d 223; *Ward* v. *Heath*, 222 N.C. 470, 24 S.E. 2d 5; *McInturff* v. *Trust Co.*, 201 N.C. 16, 158 S.E. 547; *Adcrholt* v. *R. R.*, 152 N.C. 411, 67 S.E. 978; *Williams* v. *East St. Louis Junction R. Co.*, 349 Ill. App. 296, 110 N.E. 2d 700; *Kavadas* v. *St. Louis Southwestern Ry. Co.* (Mo. App.), 263 S.W. 2d 736.

In *Williams* v. *East St. Louis Junction R. Co.*, *supra*, the case was brought pursuant to the Federal Employers' Liability Act and the evidence raised questions similar to those in the instant case. There, as here, the plaintiff testified he was injured at a particular time, place and manner, but he was the only one who so testified. All other employees who were present at the time and place testified no such injury occurred. The consideration for the release was wages in the sum of $57.38 for six days the plaintiff did not work on account of his alleged injuries. The case was submitted to the jury and the plaintiff obtained a substantial verdict. The court, however, allowed a motion for judgment in favor of the defendant notwithstanding the verdict. There, as here, the plaintiff testified in the trial below that he signed the release but did not know what he was signing and did not know its contents. The Appellate Court said: "Plaintiff very strenuously insists that the validity and effect of this release should be adjudged under federal procedure and that under federal procedure it is required that the question of the validity of a release [fol. 85] be submitted to and acted upon by the jury and that the jury's verdict is binding. He relies upon the case of *Dice* v. *Akron, C. & Y. R. Co.*, 342 U.S. 359, 72 S. Ct. 312, 96 L. Ed. 398. It is unquestionably true that federal law controls actions under the Federal Employers' Liability

Act in federal as well as state courts The Dice case, *supra*, however, is authority only for the proposition that where there is competent evidence to support the claim of fraud in securing a release the question must be submitted to a jury for a determination. It furnishes no authority that the courts may not direct a verdict or grant judgment notwithstanding the verdict where there is no evidence to sustain the allegation of fraud. Furthermore, federal law is settled that in order to avoid the effect of a release the burden is on the one attacking the settlement to show that the contract is tainted with invalidity either by fraud or mutual mistake of fact. *Callen* v. *Pennsylvania Ry. Co.*, 332 U.S. 625, 68 S. Ct. 296, 92 L. Ed. 242, 247. Therefore, the burden rested upon the plaintiff to produce evidence to show fraud as alleged in his reply to the affirmative matter in defendant's answer." The judgment in favor of the defendant was affirmed.

Likewise, in *Kavadas* v. *St. Louis Southwestern Ry. Co.*, *supra*, the action was brought under the Federal Employers' Liability Act and the release was based on one day's wages in the sum of $12.18. The plaintiff alleged the release was procured by fraud and false representations. The case was submitted to the jury and the jury returned a verdict in favor of the plaintiff. On appeal, the Court said: "As we have already indicated it is our view that the evidence was not sufficient to make an issue for the jury upon the question of fraud in procuring the release. * * * There is some evidence in the record to indicate that plaintiff sustained substantial injuries and we must therefore confess that we are reluctant to hold that he is barred from recovery because he signed a release upon receipt of $12.18. However, this Court cannot relieve the plaintiff [fol. 86] of the consequences of his bargain without a valid legal reason for doing so. Mere inadequacy of consideration is not enough. *Vondera* v. *Chapman*, 352 No. 1934, 180 S.W. 2d 704. To hold otherwise would establish a precedent which would make it difficult to settle controversies and would be contrary to the established policy of the law to encourage peaceful settlements. * * *" The judgment was reversed.

There is no evidence in the record before us to support the contention of plaintiff that he was entitled, as a matter of right, to the $144.60 as wages for the time he did not

work because of his alleged injuries. Therefore, unless the release was procured by fraud and duress, as alleged in plaintiff's reply to the affirmative matter pleaded in defendant's answer, the judgment as of nonsuit entered in the court below must be upheld.

As we construe the plaintiff's evidence, he does not show any fraud or duress on the part of the defendant or its agents, but, on the contrary, his own testimony negatives his allegation in that respect.

In our opinion, the plaintiff and the defendant entered into the release in good faith. Neither party at the time of the execution of the release had any idea that the plaintiff had sustained an injury that might or would develop into any permanent disability. There may have been mutual mistake on the part of the plaintiff and the defendant in this respect, as was alleged and relied on in *Collen* v. *Pennsylvania Ry. Co., supra;* however, in the instant case, the plaintiff's cause of action is not bottomed on mistake but on fraud and duress.

In light of the record before us and applicable decisions bearing thereon, we are constrained to hold that the ruling of the court below must be upheld.

Affirmed.

PARKER J. DISSENTS.

[fol. 87] SUPREME COURT OF NORTH CAROLINA, WAKE COUNTY, FALL TERM, 1959

No. 453

EUGENE E. MAYNARD,

vs.

DURHAM AND SOUTHERN RAILWAY COMPANY

JUDGMENT—January 29, 1960

This cause came on to be argued upon the transcript of the record from the Superior Court Wake County: Upon consideration wherof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable Emery B. Denny, Justice, be certified to the said

Superior Court, to the intent that the Judgment is Affirmed. And it is considered and adjudged further, that the plaintiff do pay the costs of the appeal in this Court incurred, to wit, the sum of Thirty-Six and no/100 dollars ($36.00), and execution issue therefor.

A true copy.

Adrian J. Newton, Clerk of the Supreme Court, By Sarah G. Barbee, Deputy Clerk.

[fol. 88] TENTH DISTRICT, WAKE COUNTY

No. 453

IN THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

EUGENE E. MAYNARD,

v.

DURHAM AND SOUTHERN RAILWAY COMPANY

CLERK'S CERTIFICATE

Appeal Docketed 26 October, 1959
Case Argued 3 November, 1959
Opinion Filed 29 January, 1960
Final Judgment 29 January, 1960

I, Adrian J. Newton, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect transcript of the record and proceedings in the above-entitled case as the same are taken from and compared with the originals on file in my office. I do further certify that the time for filing a petition to rehear has expired.

Witness my hand and official seal at Raleigh, North Carolina, this the 22nd day of April, 1960.

Adrian J. Newton, Clerk of the Supreme Court of North Carolina.

[fol. 89] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR CERTIORARI—June 27, 1960

On petition for writ of Certorari to the Supreme Court of the State of North Carolina.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1043 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 27, 1960.

☆ U. S. GOVERNMENT PRINTING OFFICE 1960

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 183

EUGENE E. MAYNARD,

Petitioner,

vs.

DURHAM AND SOUTHERN RAILWAY COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NORTH CAROLINA

BRIEF FOR PETITIONER

CHARLES F. BLANCHARD
WILLIAM T. HATCH
SAMUEL H. JOHNSON
WILLIAM JOSLIN

All of Raleigh, North Carolina
Attorneys for Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 183

EUGENE E. MAYNARD,

Petitioner,

vs.

DURHAM AND SOUTHERN RAILWAY COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NORTH CAROLINA

BRIEF FOR PETITIONER

Opinion Below

The opinion of the Supreme Court of North Carolina (R. 51-58) is reported in 251 N.C. 783 and 112 S.E. 2d 249.

Jurisdiction

The judgment of the Supreme Court of North Carolina was entered on 29 January, 1960 (R. 59). The petition for a writ of certiorari was filed on 27 April, 1960 and was granted on 27 June, 1960 (R. 60). The jurisdiction of this Court is invoked under Title 28, United States Code, §1257.

Questions Presented

1. Does the right to trial by jury guaranteed by the Federal Employers' Liability Act extend to a disputed release to the same extent that it does to an issue of negligence?

2. In a State Court action, under the Federal Employers' Liability Act, was a judgment as of involuntary nonsuit proper when the plaintiff produced evidence at the trial admittedly sufficient for the jury on the question as to the defendant's negligence, and evidence that:

(a) he was paid no consideration for a release relied upon by the defendant railroad and

(b) the release was procured by fraudulent concealment by agents of the defendant railroad of the real intent and purport of the instrument and by acts and omissions which, under the circumstances, were designed to mislead and did mislead the plaintiff into believing that he was signing for his pay check?

Statute Involved

The statutory provision involved is Federal Employers' Liability Act, 45 U.S.C.A., §51:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the

death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149 §1, 35 Stat. 65; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404.

Statement

The petitioner was injured on August 22, 1955 while assisting in the loading of a motorized track car into the rear of one of the defendant's trucks in Dunn, N.C. (R. 16). The case was tried in the Wake County Superior Court, Raleigh, N.C. at the Second April Regular Civil Term, 1959, before Williams, J. At the close of the plaintiff's evidence the defendant moved for judgment as of nonsuit. The motion was denied. The defendant introduced its evidence which included what was purported to be a release signed by the plaintiff and renewed its motion. The

motion was allowed (R. 15). The plaintiff appealed to the Supreme Court of North Carolina, which affirmed the decision of the Wake County Superior Court by an opinion printed in the Transcript of Record (R. 51), reported in 251 N.C. 783 and 112 S.E. 2d 249. Justice Parker dissented.

The defendant conceded in open Court in the North Carolina Supreme Court "that probably the evidence offered by the plaintiff in the trial below was sufficient to take the case to the jury had the plaintiff not signed the release set out herein, which the defendant pleaded in bar of his right to recover" (R. 54-55). Following his injury, the plaintiff was off the job for several days as a result of his injuries, including a stay of six or seven days at Duke Hospital (R. 19). The plaintiff returned to work prior to the 17th day of September, 1955, and was working for the defendant on September 15, 1955.

On Saturday, September 17, 1955, the plaintiff went to the office of the defendant's General Manager to get his paycheck (R. 20-21). At the time he went to the General Manager's office, the defendant owed him $144.60 for labor (R. 20-21). When the plaintiff entered the General Manager's office, he asked for his paycheck (R. 21). The General Manager pushed a paper lying on his desk toward the plaintiff, and keeping the paper partially covered with his hand, told the plaintiff to sign it (R. 21). The plaintiff had been required to sign for every paycheck he had ever received from the defendant (R. 21), and, believing that it was a receipt for wages, he signed the document later identified as the defendant's Exhibit No. 2 (R. 21, 46) and received $144.60, the exact amount due him at the time for labor, from the defendant (R. 21).

The plaintiff did not read the paper he signed in the office of the defendant's General Manager (R. 21, 26, 27).

The paper was not explained to him (R. 21, 27). He was not told that he was signing a release (R. 26). He was not given a chance to read the paper (R. 27). The defendant's General Manager kept the paper partially covered with his hand (R. 21, 26, 27). The plaintiff, who was misled into thinking that he was signing for his paycheck (R. 21), signed the paper believing it was a receipt for wages (R. 27). He would not have signed the paper had he known it was a release (R. 31). The money paid to the plaintiff by the defendant as consideration for the so-called release was money actually due the plaintiff for labor performed (R. 21). The plaintiff was never paid anything for the injuries he received on the occasion in question (R. 21, 31). On the morning the release was signed the plaintiff had been taking medicine prescribed by his doctor for pain (R. 21) and was not rational (R. 27).

After September 17, 1955, the plaintiff worked for the defendant until May 16, 1956, at which time he was forced to stop due to his physical condition (R. 27). The plaintiff did not work again for the defendant (R. 29), and was discharged by the defendant in December, 1956 (R. 29). The plaintiff went to several doctors between May 1956 and December 1956 (R. 27) and had several conferences with the defendant's representatives in September and October, 1956, during which the defendant's representatives attempted to get the plaintiff to return to work (R. 28, 29). During one of these conferences on October 12, 1956, he was told by the defendant's representatives that he could not return to work unless he would sign a full release (R. 28, 31). This was never done (R. 21, 22).

Summary of Argument

The plaintiff attacked the validity of the so-called release on two grounds: First, that the release was unsupported by any consideration and therefore void and, second that its execution was procured by fraud, misrepresentation and undue influence on the part of defendant's agents.

1. With respect to the question of consideration, the plaintiff produced evidence at the trial that the defendant was indebted to him in the sum of $144.60 for wages when the so-called release was executed and that he thought he was signing the payroll records. On this point, the Supreme Court of North Carolina relied on the reasoning in the decisions of two intermediate State Courts—in the cases of *Williams* v. *East St. Louis Junction Railroad Co.*, 349 Ill. App. 296, 110 N.E. 2d 700 (1953) and *Kavadas* v. *St. Louis Southwestern Railroad Co.* (Mo. App.), 263 S.W. 2d 736 (1954), both of which are factually distinguishable and both of which involved primarily the question of inadequacy of consideration, not total failure of consideration. The Supreme Court of North Carolina apparently overlooked, among others, several federal cases, including *Burns* v. *Northern Pacific Railroad Co.*, 8th Cir., 134 F. 2d 766, and *Hogue* v. *National Automobile Parts Association*, 87 F. Supp. 816, which hold that a release is not supported by a sufficient consideration unless something of value is received to which the creditor had no previous right.

2. The second basis upon which the plaintiff attacked the validity of the release was that its execution was procured by fraud, misrepresentation, and undue influence. The Supreme Court of North Carolina dismissed this contention of the plaintiff referring only to the intermediate state court decisions of *Williams* v. *East St. Louis Junc-*

tion Railroad Co. and *Kavadas* v. *St. Louis Southwestern Railroad Co., supra* and apparently overlooking the overwhelming weight of federal authority to the contrary. The North Carolina Supreme Court simply noted that the plaintiff "does not show any fraud or duress on the part of the defendant or its agents but, on the contrary, his own testimony negatives his allegations in that respect."

The plaintiff's evidence on this feature of the case was abundantly sufficient to support a jury finding that the plaintiff was deliberately misled by the acts and omissions of defendant's agent into believing that what he was signing was a receipt for his pay check.

The vast Federal authority holds that, under the circumstances revealed by the record in this case, the issue of fraud in the procurement of the release should have been submitted to the jury. *Dice* v. *Akron, Canton and Youngstown R.R. Co.*, 342 U.S. 359, 96 L. Ed. 398; *Purvis* v. *Pa. R.R. Co.*, 3rd Cir., 198 F. 2d 631, certiorari denied 344 U.S. 898, 97 L. Ed. 694; *Graham* v. *Atchison, T. and S.F. Ry. Co.*, 9th Cir., 176 F. 2d 819; *Ricketts* v. *Pa. R.R. Co.*, 2d Cir., 153 F. 2d 757; *Irish* v. *Central Vermont Ry., Inc.*, 2d Cir., 164 F. 2d 837; *Camerlin* v. *N.Y. Central R. Co.*, 1st Cir., 199 F. 2d 698; *Scarborough* v. *A.C.L. R.R. Co.*, 4th Cir., 202 F. 2d 84; *Brown* v. *Pa. R.R. Co.*, 2d Cir., 158 F. 2d 795; *Gifford* v. *Wichita Falls and S. Ry. Co.*, 5th Cir., 211 F. 2d 494; *Marshall* v. *N.Y. Cent. R.R. Co.*, 7th Cir., 218 F. 2d 900.

POINT ONE

Federal, Not State, Law Prevails.

As in the case of other matters arising under the Federal Employers' Liability Act, the validity of releases under that Act raises a Federal question to be determined by Federal rather than State law.

Dice v. *Akron, Canton and Youngstown Railroad Company*, 342 U.S. 359, 96 L. Ed. 398; *South Buffalo Railway Company* v. *Ahern*, 344 U.S. 367, 97 L. Ed. 395; *Garrett* v. *Moore-McCormack Company, Inc.*, 317 U.S. 239, 87 L. Ed. 239. As was stated by the Court of Appeals for the Ninth Circuit in *Graham* v. *Atchison, T. and S.F. Ry. Co.*, 9th Cir., 176 F. 2d 819 at 824:

> "In applying this principle, Courts have held, in very recent years, that the validity of a release entered into by an Employee entitled to the benefits of the Federal Employers' Liability Act, is . . . governed by Federal Law."

POINT TWO

Defendant Concedes Evidence Sufficient to Take the Case to Jury Had Plaintiff Not Signed the So-Called Release.

In open Court in the North Carolina Supreme Court the "defendant concedes that probably the evidence offered by the plaintiff in the trial below was sufficient to take the case to the jury had the plaintiff not signed the release set out herein, which the defendant pleaded in bar of his right to recover" (R. 54, 55). The plaintiff clearly produced evidence showing that the injuries of which he complains resulted "in whole or in part" from the negligence of the defendant. 45 U.S.C.A., Sec. 51; *Ellis* v. *Union Pac. R. Co.*,

329 U.S. 649, 91 L. Ed. 572; *Wilkerson* v. *McCarthy*, 336 U.S. 53, 93 L. Ed. 497; *Stone* v. *N.Y., Chicago & St. L. R. Co.*, 334 U.S. 407, 97 L. Ed. 441.

The Supreme Court of the United States in *Rogers* v. *Missouri Pac. R. Co.*, 352 U.S. 500, 1 L. Ed. 21, 493, at page 500, noted that "The Statute (45 U.S.C.A., Sec. 51) expressly imposes liability upon the employer to pay damages for injury or death due in whole or in part to its negligence . . . The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference."

POINT THREE

Only Preponderance or Greater Weight of Evidence Is Required to Set Aside Release.

In the trial in the Superior Court and in the North Carolina Supreme Court the respondent contended that the release under consideration could not be set aside except by evidence which was clear, strong and convincing (R. 55).

In this contention, the respondent has little, if any, support.

In the case of *Purvis* v. *Penn. R.R. Co.*, 3rd Cir., 198 F. 2d 631, certiorari denied 344 U.S. 898, 97 L. Ed. 694, the court noted that prior to the case of *Dice* v. *Akron, C. and Y. R. Co.*, 342 U.S. 359, 96 L. Ed. 398, "It had been assumed that the Federal Rule was that the evidence had

to be clear, unequivocal and convincing." After referring repeatedly to the *Dice* case, however, the Court of Appeals for the Third Circuit concluded that in actions under the F.E.L.A. involving the validity of a release alleged to have been procured by fraud, "Proof of fraud need be only by a preponderance of relevant evidence."

The North Carolina Supreme Court declared in the principle case below that North Carolina recognizes the rule to be the same:

> In this jurisdiction, if the action is to set aside an instrument allegedly procured by fraud or undue influence, the burden of proof to establish such allegation is by the preponderance or greater weight of the evidence. On the other hand, if the action is to reform an instrument, the evidence must be clear, strong, cogent, and convincing. *Walters* v. *Bridgers,* 251 N.C. 289, 111 S.E. 2d 176; *Henley* v. *Holt,* 221 N.C. 274, 20 S.E. 2d 62; *Ricks* v. *Brooks,* 179 N.C. 204, 102 S.E. 207; *Bolich* v. *Insurance Co.,* 206 N.C. 144, 173 S.E. 320.

POINT FOUR

So-Called Release Unsupported by Any Consideration and Therefore Void.

The decision of the Supreme Court of North Carolina in the instant case is directly in conflict with the relevant decisions of the Federal Courts and with the standard imposed by the Federal law governing the construction, operation, and effect of releases despite the conceded fact that the liability of the defendant Railroad in this case must be determined in accordance with decisions of the Federal Courts interpreting and construing the Federal Employers' Liability Act and cases arising thereunder.

In the trial below, the plaintiff attacked the validity of the so-called release on two grounds: First, that the release was unsupported by any consideration and therefore void and, second that its execution was procured by fraud, misrepresentation, and undue influence on the part of the defendant's agents.

With respect to the question of consideration, the plaintiff produced evidence at the trial that the defendant was indebted to him in the sum of $144.60 for wages when the so-called release was executed; that he thought he was signing the payroll records. On this point, the Supreme Court of North Carolina relied on the reasoning in the decisions of two intermediate State courts—in the cases of *Williams* v. *East St. Louis Junction Railroad Co.*, 349 Ill. App. 296, 110 N.E. 2d 700 (1953) and *Kavadas* v. *St. Louis Southwestern Railroad Co.* (Mo. App.), 263 S.W. 2d 736 (1954), both of which are factually distinguishable and both of which involved primarily the question of inadequacy of consideration, not total failure of consideration.

There would seem to be no question but that a release, like any other contract, must be supported by consideration. 76 C.J.S., RELEASE, Sec. 10, p. 633; *Barnes* v. *Ward, et al.*, 45 N.C. 93. It appears to be equally well established that the performance by the Releasee of some legal duty owing by him to the Releasor is not consideration for a release. 76 C.J.S., RELEASE, Sec. 14, page 636. As stated in 76 C.J.S., RELEASE, at page 636:

> "A release of a legal obligation for which the consideration is the performance by the releasee of some undisputed legal duty owing by him to the releasor . . . is invalid for want of consideration. As otherwise stated, the rule is that a release is not supported by a sufficient consideration unless something of value was received to which the creditor had no previous right.

> So the full performance of an admitted debt or the full performance of one obligation is not consideration for the release of a second debt or obligation, likewise, performance by one person of his legal obligation is no consideration for the release of another."

Burns v. *Northern Pacific Ry. Co.*, 8th Cir., 134 F. 2d 766, involved an action by a railroad steward against his employer for wrongful discharge. The railroad's defense was based primarily upon a release procured from the plaintiff in consideration of the sum of $225.00. The plaintiff, who attacked the validity of the release on the theory that it was unsupported by consideration, introduced evidence tending to show that at the time the release was executed, the defendant was indebted to him in the sum of $225.18 for wages and expenses. In the lower Court, a judgment was entered upon a directed verdict for the defendant. In reversing the lower Court the Circuit Court, after noting that at the time the release was procured the defendant was indebted to the plaintiff in an amount in excess of the sum paid for the release, held:

> "A release is not supported by a sufficient consideration unless something of value is received to which the creditor had no previous right." (Citing: *Tupper* v. *Massachusetts Bonding and Ins. Co.*, 156 Minn. 65, 194 N.W. 99.)

The Court in the *Burns* case also noted:

> "A person cannot create a dispute sufficient as consideration for a compromise by a mere refusal to pay an undisputed claim. That would be extortion, and not compromise."

The decision in the *Burns* case was squarely followed in *Hogue* v. *National Automotive Parts Association*, 87 F.

Supp. 816. See also *Moruzzi* v. *Federal Life and Casualty Co.*, 42 N.M. 35, 75 P. 2d 320, 115 A.L.R. 407.

In the instant case, the plaintiff testified (R. 20, 21) that when he went to the office of the defendant's General Manager on the morning that the so-called release was signed the General Manager "Asked me what he could do for me and I told him I wanted my pay check, meaning that I wanted a check for what was due to me for my time with the Railroad." The plaintiff also testified (R. 21):

> "I signed the paper because every check that we ever got from the railroad we had to sign for it. I thought I had to sign it for my pay check. At that time the railroad owed me $144.60 odd cents for labor. I never received anything from the railroad as a result of the injury which I have described here today."

It is submitted that in the light of the evidence noted above there was abundant evidence to the effect that at the time the so-called release was executed the defendant was indebted to the plaintiff in an amount at least equal to, if not in excess of, the recited consideration for the release (R. 50c). Had the jury been given the opportunity, it would certainly have been justified in so finding. Had the jury so found, it appears by virtue of the authorities noted above that the release would have been void for lack of consideration. In any event, counsel for the plaintiff feel that the evidence on this point was more than sufficient to require its submission to the jury.

POINT FIVE

Execution of So-Called Release Procured by Fraud, Misrepresentation, and Undue Influence on Part of Defendant's Agents Required Submission to Jury.

The second basis upon which the plaintiff attacked the validity of the release was that its execution was procured by fraud, misrepresentation, and undue influence. The Supreme Court of North Carolina dismissed this contention of the plaintiff referring only to the intermediate state court decisions of *Williams* v. *East St. Louis Junction Railroad Co.* and *Kavadas* v. *St. Louis Southwestern Railroad Co., supra* and apparently overlooking the overwhelming weight of federal authority to the contrary. The North Carolina Supreme Court simply noted that the plaintiff "does not show any fraud or duress on the part of the defendant or its agents but, on the contrary, his own testimony negatives his allegations in that respect."

The plaintiff's evidence on this feature of the case was abundantly sufficient to support a jury finding that the plaintiff was deliberately misled by the acts and omissions of defendant's agent into believing that what he was signing was a receipt for his pay check. In this connection, it should be borne in mind that this case was withdrawn from the jury by a judgment of involuntary nonsuit and that even under the North Carolina Rules of Practice any discrepancies or contradictions in the plaintiff's testimony are, on motion to nonsuit, to be construed in the light most favorable to plaintiff. *Keaton* v. *Taxi Co.*, 241 N.C. 589, 86 S.E. 2d 93, citing other authority.

The petitioner's evidence may be summarized as follows:

On Saturday, September 17, 1955, the plaintiff went to the office of the defendant's General Manager to get his

pay check (R. 20-21). At this time, the defendant owed him $144.60 for labor (R. 20-21). The plaintiff had been taking medicine prescribed by his doctor for pain (R. 21) and was not rational (R. 26). The plaintiff took no one with him and he and the General Manager were alone in the latter's office (R. 21). The defendant's General Manager asked the plaintiff how he was getting along and the plaintiff replied that he wasn't any better, that he still hurt (R. 21). The General Manager then asked the plaintiff what he could do for him and the plaintiff replied that he wanted his pay check (R. 21). (The Court's attention in invited to the fact that the meeting in question took place on a Saturday morning, a day upon which laborers normally receive their wages.)

When the plaintiff requested his paycheck, the defendant's General Manager took a paper from his desk drawer and, keeping it partially covered with his hand, pushed it across his desk for the plaintiff and told the plaintiff to sign it (R. 21). The plaintiff had been required to sign for every pay check he had ever received from the defendant (R. 20-21) and, believing that the paper was a receipt for wages, he signed the document later identified as the defendant's Exhibit number two (R. 20-21) and received a check for $144.60, the exact amount due him by the defendant at the time for labor (R. 21).

The plaintiff, who "thought a lot" of the defendant's General Manager (R. 26), did not read the paper he signed in the office of the defendant's General Manager (R. 21, 26). The paper was not explained to him nor was it read to him (R. 21). He was not told that he was signing a release (R. 26).

He was not given a chance to read the paper (R. 26, 27). The defendant's General Manager kept the paper partially covered with his hand (R. 21, 26). The plaintiff, who was

misled into thinking he was signing for his paycheck (R. 21) signed the paper believing it was a receipt for wages (R. 26). He would not have signed the paper had he known it was a release (R. 31). The plaintiff was never paid anything for the injuries he received on the occasion in question (R. 21, 31).

An examination of the host of Federal precedents apparently overlooked by the Supreme Court of North Carolina, will thoroughly substantiate the conclusion that the issue of fraud in the procurement of the release should have been submitted to the jury.

The case of *Dice* v. *Akron, Canton and Youngstown R.R. Co.*, 342 U.S. 359, 96 L. Ed. 398, appears to be the leading authority on releases taken under the Federal Employers' Liability Act. It involved a railroad fireman who admitted signing a document, which later turned out to be a full release for injuries sustained by him in a derailment, for the sum of $924.63. The plaintiff who did not read the release, contended that it was void because he had signed it relying on the defendant's representations that it was nothing more than a receipt for back wages. The Supreme Court of Ohio reversed a lower Court Judgment for the plaintiff, primarily on the theory that the plaintiff was "guilty of supine negligence" in failing to read the release and the case came to the Supreme Court of the United States on writ of certiorari to the Supreme Court of Ohio. In reversing the Ohio Supreme Court, the Supreme Court of the United States, after noting that Federal law controlled, rather than the law of the State of Ohio, and that the Supreme Court of Ohio was in error in applying Ohio law to a release taken under the Federal Employers' Liability Act, held that the case was properly submitted to a jury and that a judgment should have been entered on the jury's verdict. In reaching this conclusion, the Supreme Court of the United States held:

"We hold that the correct Federal rule is that . . . a release of rights under the Act is void when the Employee is induced to sign it by the deliberately false and material statements of the Railroad's authorized representatives made to deceive the Employee as to the contents of the release."

The Court also noted:

"The right to trial by jury is a basic and fundamental feature of our system of Federal Jurisprudence and . . . is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act."

The case of *Purvis* v. *Pennsylvania R.R. Co.*, 3rd Cir., 198 F. 2d 631, certiorari denied 344 U.S. 898, 97 L. Ed. 694, which was decided subsequent to the *Dice* case, is almost on "all-fours" with the case at hand. The plaintiff sustained certain personal injuries on October 13, 1943, while in the employ of the defendant. Twelve days later, while claiming wages due in the amount of $48.00, he signed a release of his claim for personal injuries and received a check for $45.00. He admitted his signature on the release, but stated that "It must have been covered up with paper" at the time he signed it. He also testified that he "wouldn't have signed a release at the time." He did not read the release. There was no evidence of any affirmative misrepresentation on the part of the defendant's Claim Agent.

The Court of Appeals for the Third Circuit held in the *Purvis* case:

"We agree with the District Judge that the validity of the release, under the testimony, was properly a jury question . . . Whether there was fraud in the obtainment of the release was held to be a jury question and rightly so."

It is difficult to distinguish the factual situation before the Court of Appeals for the Third Circuit in the *Purvis* case from the factual situation in the case at hand. If anything, the facts of the *Purvis* case were more favorable to the defendant than the facts in the instant case.

Counsel for the plaintiff believe that the court below committed error in that it incorrectly interpreted the applicable Federal law. It is submitted that an examination of the relevant Federal decisions will thoroughly substantiate this conclusion.

The Court of Appeals for the Ninth Circuit, for example, commenting on the question of fraud in the procurement of a release under the Federal Employers' Liability Act in *Graham* v. *Atchison, T. & S.F. Ry. Co.*, 9th Cir., 176 F. 2d 819 at 826, said:

> "The courts have frequently held in no uncertain terms that, where a release is tainted with fraud, it should not be sustained, and that the question of whether or not such taint exists is one to be submitted to and decided by the jury. In *Kansas City M.B. Ry. Co.* v. *Chiles*, 86 Miss. 361, 38 So. 498, it was said 'No release of this nature should be upheld if *any element of fraud, deceit, oppression, or unconscionable advantage is connected with the transaction.* (Emphasis supplied.) And in passing on the validity of such release when assailed, all surrounding conditions should be fully developed, and the relative attitudes of the contracting parties clearly shown.' This attitude accords with the views of this Court, which considers even 'An innocent misrepresentation of the facts of the releasor's injury, made by the releasee's physician,' *Great Northern R. Co.* v. *Fowler*, 9th Cir., 136 F. 118, as a ground for voiding a release induced by it."

In *Ricketts* v. *Pennsylvania Railroad Co.*, 2d Cir., 153 F. 2d 757, it appeared that the plaintiff retained an attorney merely to collect his wages and tips allegedly due by the defendant. He also had a claim against the defendant for personal injuries. He later signed a release in his attorney's office, without reading it, believing it covered only the claim for wages and tips. The release actually covered the plaintiff's claim for personal injuries. The Court held that, under the circumstances, the release was invalid and did not preclude the plaintiff from maintaining an action under the Federal Employers' Liability Act for the personal injuries in question.

Irish v. *Central Vermont Ry. Inc.*, 2d Cir., 164 F. 2d 837, involved the validity of a release signed by an injured railroad employee who testified that he had been induced to execute the release by the Railroad Claim Agent's false representation that he would attempt to get the railroad to grant the plaintiff a pension. There was no question but that the plaintiff knew exactly what he was signing when he executed the release. The lower Court, basing its decision on the law of the State of Vermont, entered judgment for the defendant on the theory that there was insufficient evidence of fraud to take that issue to the jury and, further, that the plaintiff had failed to prove that he had made a restoration or a tender of restoration, of the consideration paid for the release. The Court of Appeals for the Second Circuit reversed, holding that the lower court was in error in applying Vermont law to a case arising under the Federal Employers' Liability Act and that, under the Federal law, the evidence of fraud was sufficient for the jury. The court further held that it is not necessary for a railroad employee who is attacking a release taken under the Federal Employers' Liability Act for fraud, to show a return or tender of consideration as a prerequisite to the maintenance of the action.

Camerlin v. *N.Y. Cent. R. Co.*, 1st Cir., 199 F. 2d 698, is one of the most significant cases decided in recent years involving the validity of a release taken under the Federal Employers' Liability Act. In that case, the plaintiff, a railroad employee, executed a full release for the sum of $950.00. This sum was based upon a representation by the defendant's agent that he would be out of work for six (6) months and that he was entitled to receive $25.00 per week, the same amount paid under the New York Workmen's Compensation Law, plus his medical expenses, estimated at $350.00. The defendant's agent further represented that if the plaintiff had not recovered at the end of the six months, he would continue to receive the $25.00 per week. The plaintiff testified that he thought the document he was signing was merely a "receipt to show he (the defendant's agent) delivered the $25.00 a week for the six months, plus $350.00."

The District Court granted the defendant's motion for summary judgment. The Court of Appeals for the First Circuit reversed, holding that the evidence of fraud and misrepresentation was sufficient for the jury. The Court said:

> "We take it as an a fortiori conclusion from the majority opinion in *Dice* v. *Akron, Canton and Youngstown R.R. Co.*, 342 U.S. 359, that on a complaint in a Federal District Court under the Federal Employers' Liability Act, *if there are any genuine issues of fact relevant to the validity of purported release, such issues are to be determined by the jury, not by the trial judge.*" (Emphasis added.)

The Court of Appeals in the *Camerlin* case also had occasion to pass upon the quality of proof necessary to set aside a release for fraud under the Federal Employers'

Liability Act. After mentioning two earlier cases, the Court said:

> "But in each the Court was applying the older rule that a release cannot be avoided except upon evidence which is clear, unequivocal, and convincing. This may have been the rule at one time but, at least as applied to cases under the Federal Employers' Liability Act, we take the Federal rule now to be, as indicated in the recent case of *Purvis* v. *Pennsylvania R.R. Co.*, 3d Cir., 198 F. 2d 631, that it is enough if the Employee establishes, by a preponderance of the relevant evidence, the facts invalidating the release."

In *Scarborough* v. *A.C.L. R.R. Co.*, 4th Cir., 202 F. 2d 84, the Court of Appeals for the Fourth Circuit specifically adopted the rule already adopted by the Third and Eighth Circuits concerning the quality of proof necessary in cases of fraud arising under the Federal Employers' Liability Act. The Court said:

> "The *Dice* case also makes two other points crystal clear. One point is that, as to the avoidance of the Statute of Limitations, the Federal law governs, not the State law. The second point is that even as to fraud (and it would seem, a fortiori, as to misstatement) this need be proved by the plaintiff only by a preponderance of the evidence."

Brown v. *Pennsylvania R. Co.*, 2d Cir., 158 F. 2d 795, is another case which appears to be squarely in point, by way of factual analogy, to the facts of the case at hand. In that case, a railroad employee testified that he signed a general release of liability for injuries, without reading it in full, believing it to be a receipt for lost wages, because of representations made by the defendant's Claim Agent. The

Court held, per curiam, that the question of whether the release was procured by misrepresentation was for the jury.

The recent case of *Gifford* v. *Wichita Falls and S. Ry. Co.*, 5th Cir., 211 F. 2d 494, involved a railroad employee who had signed a full release in consideration of the sum of $6,000. He brought an action under the Federal Employers' Liability Act, contending that the release was procured by the fraud of the defendant's agent in promising him a lifetime job. The court held evidence sufficient, under the Federal law, to take the question of fraud in the procurement of the release to the jury.

Marshall v. *N.Y. Cent. R.R. Co.*, 7th Cir., 218 F. 2d 900, was an action for wrongful death brought under the Federal Employers' Liability Act. The District Court entered judgment for the defendant on the theory that a full release executed by the personal representative of the deceased employee was a bar to the maintenance of the action. The plaintiff's testimony indicated that she had signed the release on the representation that it was a receipt for expense money. The Court of Appeals reversed, and held that the issue of fraud in the procurement of the release should have been submitted to the jury. The Court, noting that appellate courts have carefully scrutinized releases taken under the Federal Employers' Liability Act, to make sure that they are "untainted by fraud or over reaching," noted:

> "In every case of which we are aware, decided in recent times and involving the question of validity of release from liability under the Federal Employers' Liability Act, a directed verdict in favor of the defendant, a summary judgment in favor of the defendant or a

judgment notwithstanding the verdict, has been reversed." (Numerous cases cited.)

See also *Texas & N.O. Ry. Co.* v. *Thompson*, Tex. Com. App. 12 S.W. 2d 963; *Texas and Pacific Ry. Co.* v. *Presley*, 137 Tex. 232, 152 S.W. 2d 1105; *Johnson* v. *Elgin J. & E. Ry. Co.*, 338 Ill. App. 316, 87 N.E. 2d 567; *Pacific Elec. Ry. Co.* v. *Dewey*, 95 Cal. App. 2d 69, 212 Pac. 2d 255.

CONCLUSION

The only authorities cited by the North Carolina Supreme Court were the decisions of two intermediate state courts, i.e., *Williams* v. *East St. Louis Junction R. Co.*, *supra* and *Kavadas* v. *St. Louis Southwestern Ry. Co.*, *supra*, both of which, it is respectfully contended, involve inadequacy, not total lack, of consideration. The applicable federal authorities require careful scrutinization of releases taken under the Federal Employers' Liability Act, to the end that it may be insured that they are not tainted with fraud, or unsupported by consideration. It is submitted that by withdrawing the instant case from the jury the Supreme Court of North Carolina failed to discharge this duty.

For the reasons stated, it is respectfully submitted that the judgment of the court should be reversed.

Respectfully submitted,

CHARLES F. BLANCHARD
WILLIAM T. HATCH
SAMUEL H. JOHNSON
WILLIAM JOSLIN
Counsel for Petitioner

This the 4th day of November, 1960.

PETITION NOT PRINTED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 187

EUGENE E. MAYNARD, *Petitioner*

v.

DURHAM & SOUTHERN RAILWAY COMPANY, *Respondent*

On Writ of Certiorari to the Supreme Court of the State of North Carolina

BRIEF FOR RESPONDENT

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PARKER PRINTING CO., WASHINGTON, D. C.

SUBJECT INDEX

CITATIONS

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BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. The question for determination is whether or not the Petitioner's evidence in support of his allegations that the release was without consideration and wrongfully procured by means of fraud and duress was sufficient to warrant its submission to the jury.

2. Should the Supreme Court of the United States review a judgment of a Supreme Court of one of the

several states when the only error that could have possibly occurred in the State Supreme Court is an error in the State Supreme Court's analysis of the evidence before it?

STATEMENT

This is an action for personal injury brought by a railroad employee against his employer under and pursuant to the Federal Employers' Liability Act, wherein the Petitioner alleged that he was seriously injured on August 22, 1955 while assisting in the loading of a motor car on to the body or bed of one of Respondent's trucks. The Respondent raised as one of its defenses in the trial of the action a release signed by the Petitioner, and the Petitioner attempted to set aside the release, based on allegations that the release was obtained without consideration and by fraud, duress and undue influence.

Since Charles F. Blanchard, Esquire, counsel for Petitioner, who ostensibly prepared the Brief for the Petitioner, did not participate in the trial below or the argument before the Supreme Court of North Carolina; as will show by the record herein filed, he apparently is not familiar with the facts and details and has apparently made unintentional errors in the Petitioner's Statement of Facts; therefore, the Respondent finds it necessary to set forth the facts in detail as follows:

At the time and date of the alleged injury, the Petitioner was an apprentice section-hand foreman, and was working under the direct supervision of and was receiving instructions from Respondent's road-master and one of Respondent's section foremen.

Shortly before noon on August 22, 1955, the Petitioner was instructed to get into the bed of the said truck and to hold the handles of the motor car to keep it from rolling while three section laborers lifted the motor car into the bed of the truck (R. 36, 41, 42, 44). The Petitioner did not help lift the motor car (R. 36, 41, 42, 43, 44).

The persons present at the time of the alleged injury and when the motor car was placed on to or in the body or bed of the Respondent's truck were: Petitioner, E. E. Maynard; Petitioner's witness, J. H. Parrish; Respondent's witnesses, Freddie Williams, Walter Covington and Eugene White and H. L. Tillerson.

At the time the motor car was actually loaded into or on Respondent's truck, Petitioner Maynard was standing in the bed of the truck; the three laborers, Williams, Covington and White, picked the car up and set it in the truck, and the car was handled in a safe manner (R. 36), and the motor car did not slip or slide and did not hit Petitioner Maynard, and Petitioner Maynard made no complaint (R. 42), and the motor car was just rolled on to the truck right easy (R. 42, 43). The motor car did not lurch suddenly and could not have hit Petitioner Maynard, and Petitioner Maynard made no complaint to any person concerning being hit on August 22, 1955, the date of the alleged injury (R. 37, 42, 43, 44).

On August 23, 1955, at about 11 o'clock a.m., Petitioner Maynard talked to Respondent's roadmaster, Mr. Tillerson, and told Tillerson that he, Maynard, had hurt his back and that he MUST HAVE hurt it loading the motor car (R. 18, 44). Petitioner signed the accident report that he hurt his back lifting the

motor car into the truck (R. 50A). Maynard stated to Dr. James S. Wilson on August 25, 1955, that he had hurt his back three (3) days previously BY LIFTING A MOTOR CAR (R. 47, 48). The Petitioner never indicated in any manner that he hurt his back in the violent manner set forth in the complaint (R. 4) until the complaint was filed in 1956. The preponderance and greater weight of the evidence is that the Petitioner's testimony in respect to how he was injured and that he was injured, as alleged and testified to by the Petitioner (R. 17, 23), is untrue (R. 37, 42, 43, 44).

Respondent's roadmaster, Tillerson, met Petitioner Maynard in the Respondent's office at Apex, North Carolina, at 4 o'clock p.m. on August 23, 1955, for the purpose of making out an injury report (R. 44, 45).

An injury report was prepared on the Respondent's standard form on a typewriter by Tillerson, and Petitioner Maynard supplied each and every answer filled in on the injury report (R. 45).

PRIOR TO FILLING OUT THE ACCIDENT REPORT, THE PETITIONER HAD DISCUSSED HIS ALLEGED INJURY WITH THE CHAIRMAN OF HIS LOCAL LABOR UNION (R. 22, 33, 34). THE PETITIONER KNEW THAT HE HAD TO SIGN AN ACCIDENT REPORT WHEN HE WAS HURT ON THE RAILROAD (R. 18, 26).

The injury report (Respondent's Exhibit No. 1), with the answers supplied by Petitioner Maynard (R. 25) on August 23, 1955, and which was signed by the Petitioner, was addressed to Mr. H. A. McAllister, General Manager of the defendant railroad (R. 45, 50B).

Petitioner Maynard testified:

> "At the time I filled out that accident report, I had no idea I would ever get in a lawsuit about it." (R. 25). "I don't usually sign papers not knowing what they are." (R. 31).

Petitioner Maynard went to the tenth grade in school (R. 25), and at the time Petitioner Maynard filled out or supplied the answers for the accident report, he had no idea he would ever get into a lawsuit concerning his alleged injury (R. 25), and the Petitioner thought he just had a mild back injury and would get over it in a few weeks or a month, and when he signed the answer to the question concerning the probable disability, he meant the answer when he said "none" (R. 25).

The form was received by Mr. H. A. McAllister through the mail some three or four days after Mr. Maynard's injury and prior to the date the release was signed with Mr. McAllister on September 17, 1955 (R. 47).

For a short period of time after August 23, 1955, Petitioner Maynard was off from work (R. 25, 33), but returned to work on or about September 12, 1955, when he was referred or sent back to work by Dr. James S. Wilson (R. 48).

(The Petitioner did not stay in Duke Hospital six or seven days following his injury and prior to his executing the release, as stated in the Petitioner's Statement of Facts. There was no evidence that prior to the execution of the release the Petitioner was seriously or permanently injured, and all the evidence shows that he was improving and was apparently suffering only from a mild sprain. The Petitioner was

admitted to Duke Hospital *after May 16, 1956* (R. 27), at which time he was admitted to Duke Hospital by Dr. Owens (R. 19, 49) (sic) (Dr. Odom), to whom he was referred by Dr. Wilson after March 1956 (R. 19, 27, 49).)

A copy of the accident report made and signed by the Petitioner on August 23, 1955, was forwarded to Mr. H. A. McAllister's office, Respondent's General Manager, as aforesaid (R. 44, 45, 46), but Mr. McAllister did not see Petitioner Maynard after his alleged injury prior to September 17, 1955 (R. 45).

On Saturday, September 17, 1955, Petitioner Maynard came to Respondent's office in Durham, North Carolina, and contacted H. A. McAllister (R. 45). This was not a regular working day, and Petitioner Maynard would not have to report to Durham for his earned wages, because he received his earned wages or regular check in Apex, North Carolina (R. 45), and he signed the release at a different place from where he usually signed for his paycheck (R. 31).

When Petitioner Maynard contacted Mr. McAllister, he asked McAllister if the company would pay him for the time he was off and stated that he was ready to sign a release (R. 45); and advised McAllister that he was feeling much better and thought he was going to be all right (R. 45), which confirmed the accident report (Respondent's Exhibit No. 1). Mr. McAllister's only knowledge concerning the condition of Petitioner Maynard was the accident report and the statements made by Petitioner Maynard (R. 45, 47).

The release form, which had been prepared based on the written representations of Petitioner Maynard

in the accident report and upon his representations made unto roadmaster Tillerson, was explained in detail to Petitioner Maynard by Mr. McAllister prior to its being executed by Petitioner Maynard (R. 45). Petitioner Maynard knew that any money paid to him by Mr. McAllister was *not* for labor performed (R. 26) and that the release explained to him and shown to him and executed by him was not the kind of thing that he would sign for his regular paycheck (R. 26). The release was witnessed by two witnesses (R. 21, 50C).

Maynard testified:

> "I don't usually sign papers not knowing what they are." (R. 31).

Notwithstanding anything to the contrary in Petitioner's Statement of Facts, it is abundantly clear that the sum of $144.60 received by Petitioner as a result of his executing the release was not due the Petitioner for labor performed or for wages earned (R. 26), and the Chairman of the local union, Petitioner's witness, testified that the policy of the railroad for over forty years was that you did not get a sum of money equivalent to wages you would have earned had you worked when you were away from work unless you signed a release (R. 34, 35), *and this same Petitioner's witness discussed the alleged injury with the Petitioner prior to the Petitioner's signing the accident report and the release* (R. 22, 33).

At the time Petitioner Maynard signed and executed the said release and received the consideration therein set forth, Petitioner Maynard knew or should have known that it had been the policy and rule of the defendant railroad not to pay wages (or the equivalent of wages) to any injured employee who had been away

from work due to any alleged injury arising out of or in connection with work for the Respondent, unless the allegedly injured person signed a release upon his return to work, and that upon signing the release, the allegedly injured person was paid a sum equivalent to the salary he would have been making had he actually worked and not been out due to an alleged injury as consideration for signing the release (R. 34). The obvious and only reason for the Respondent to so pay allegedly injured employees when they return to work is to eliminate and settle any possible or contingent claim against the railroad and as a matter of compromising any alleged liability that the railroad might have arising out of the injury of any employee. Certainly, it was a "fair break" to the Respondent's employees and particularly to Petitioner Maynard (R. 34).

While Petitioner Maynard was in Mr. McAllister's office concerning the release and the monies paid to him, McAllister did not use any duress, force or any misrepresentations, or any other element of fraud concerning the release (R. 31), and McAllister, on behalf of the defendant railroad, entered into the agreement for the railroad in good faith, based on the representations made by Petitioner Maynard in the executed accident report and the statements made verbally by Petitioner Maynard to Mr. Tillerson and Mr. McAllister (R. 47). Mr. McAllister had no other knowledge as to whether or not the Petitioner was actually injured on the railroad or otherwise at the time of the execution of the release (R. 47).

At the time Mr. McAllister explained the release to Petitioner Maynard, McAllister did not know what Maynard's disability was or might be in the future, he

did not make any false representations, he did not make any fraudulent suggestions, and Maynard did not think he was going to be hurting in the future (R. 31).

> "Mr. McAllister didn't tell me anything about it; he didn't tell me a story about it. All he did was ask me how I was. On that particular day, I didn't know how long in the future, I still thought it was temporary. At that time I didn't know what it was that I was signing or I wouldn't have signed it. At that time, Mr. McAllister didn't know what my disability might be in the future from my injury. He didn't make me any false representations. The only thing he did do there, he just didn't explain the paper to me. He didn't make any deceitful suggestions to me. He didn't make any fraudulent suggestions to me. He just put the paper down there, and I signed it and got my check and left. I didn't think I was going to be hurting in the future." (R. 31).

After signing the release and receiving the consideration therefor, on the 17th day of September, 1955, *Petitioner Maynard continued to work for the Respondent until May 16, 1956, when he stopped and went to see the doctor* (R. 27). When Petitioner Maynard signed the accident report of August 23, 1955, he admitted that his probable disability would be "none" (R. 25).

When Petitioner Maynard signed the release on September 17, 1955, he had been back to work for three days and had been taking only a mixture of aspirin and codeine when necessary for pain, and this mixture did not interfere with his mental capacity (R. 48).

After May 16, 1956, Petitioner Maynard was off from work for a considerable period of time due to

the alleged injury and visited various doctors concerning same (R. 27).

On or about September 1, 1956, Maynard was advised by his doctors to return to work (R. 27, 28, 34), but rather than returning to work, he arranged for a conference with Mr. McAllister on September 7, 1956, with his attorney, Mr. Johnson (R. 27). Thereafter, on or about September 17, 1956, Petitioner Maynard advised Mr. McAllister and Mr. Tillerson that he would return to work in the near future (R. 28).

Thereafter, on or about October 12, 1956, Petitioner Maynard came to the Respondent's Durham office and contacted Mr. Holder, Vice President and General Auditor, and advised Mr. Holder that he had "fired" his lawyers, and had Mr. Holder call Mr. Nye to arrange an appointment concerning coming back to work, and Mr. Holder advised Mr. Nye, attorney for the railroad, that he, Maynard, had "fired" his lawyers (R. 28).

Thereupon, Petitioner Maynard went to Mr. Nye's office with Mr. Holder on October 12, 1956, and informed Mr. Nye that he had discharged his attorneys and wanted to return to work, and further informed Mr. Nye that he had applied for retirement and that the Board had turned him down (R. 28). Mr. Nye advised Petitioner Maynard that he could have his job back (R. 28).

Thereafter, upon Petitioner's request, a conference was arranged in Mr. Nye's office on October 23, 1956 (R. 34), so that the Petitioner could get two or three things straightened out. Present at the conference were Petitioner Maynard, B. F. Bailey, Petitioner's union representative, Mr. Nye, Mr. Tillerson, Mr.

Holder and Mr. McAllister (R. 33), and Petitioner Maynard had a great deal to say about what Tillerson had done and the way he had treated him (R. 34).

At the said conference, Petitioner Maynard got up from his seat and was mad when he was informed that he would not be paid sums equivalent to his salary for days absent from work covering the period after the first day of September, 1956, because the doctors had told him to report back to work on the first day of September, and he had failed to report back to work (R. 34).

It is obvious here that the Respondent was agreeable to paying the Petitioner an additional sum of money because he had been out of work for several months (May 16, 1956, to September 1, 1956), again due to his alleged injury, but was not willing to pay him the equivalent of wages after the first of September, when he failed to return to work after being advised to return to work on the said date by his doctors, and, of course, to get an amount of money equivalent to the wages he would have earned during the period May 16, 1956, to September 1, 1956, he would have had to sign another release, under the forty year policy of the Respondent (R. 34, 35).

Petitioner Maynard was an experienced railroad employee prior to August 22, 1955 (R. 25), and had been previously injured while working for a railroad. (R. 25).

Maynard was not abused or mistreated during the discussion and conference of October 23, 1956, and he had present at the conference the Chairman of the local union, whose job was to see that laborers with whom he was associated got a fair break (R. 34), and

the discussion between the parties was equal and no worse on one side than the other (R. 35). Nothing was said and no complaint was made at this conference on October 23, 1956, about the obtaining of the September 17, 1955 release by fraud, misrepresentation or any undue influence (R. 29, 34), and the first complaint or notice concerning fraud was set forth in the Petitioner's written Reply to the Respondent's Answer (R. 13).

Petitioner Maynard was advised on October 23, 1956, that if he came back to work, he had to come back to work in good faith, and that he would be received in good faith by the Respondent (R. 29), and under the railroad's forty-year policy, the Respondent would pay him the equivalent of wages covering his period of absence, May 16, 1956 to September 1, 1956, upon his executing another release, as customary (R. 28, 30, 33, 34, 35).

Maynard did not return to work at any time thereafter. Maynard's name was officially dropped from the rolls of the Respondent only in December, 1956 (R. 29).

SUMMARY OF ARGUMENT

The Petitioner attacked the validity of the Respondent's release on two grounds; first, that the release was unsupported by any consideration and therefore void; and, second, that its execution was procured by fraud, misrepresentation and undue influence on the part of the Respondent's agent, which attack was clearly recognized and understood by the Supreme Court of North Carolina (R. 55).

1. With respect to the question of consideration, *the Petitioner's testimony, standing alone,* shows that

the $144.60 he received for and in consideration of signing the release was not money earned and was not for labor performed (R. 26), and the $144.60 was paid to the Petitioner as an equivalent of wages for and in consideration of the Petitioner's executing the release, under a forty-year standing policy of the railroad (R. 34, 35). In addition, the Petitioner received a further consideration from the Respondent by the Respondent's providing, at its expense, the best obtainable medical care for the Petitioner over an extended period of time (R. 19, 27, 46, 49). There is no evidence in the record to support any contention of the Petitioner that he was entitled, as a matter of right, to the $144.60 as wages for the time he did not work because of his alleged injuries (R. 26, 34, 35, 57, 58).

2. Concerning the second basis upon which the Petitioner attacked the validity of the release, the evidence does not show any fraud, duress or undue influence on the part of the Respondent or its agents, but, on the contrary, the Petitioner's own testimony negatives his allegation in that respect (R. 25, 31, 58). The only true basis of the lawsuit lies in the fact that the Petitioner did not like the way Mr. Tillerson "treated him" and because he could not get the equivalent of wages for the period during which he did not work at all after September 1, 1956, at which time he was advised to return to work by his doctors (R. 34), and it is respectfully submitted that when one carefully reviews the complete record, it is evident that the Petitioner's entire alleged cause of action is a sham and completely frivolous and that neither the evidence concerning the negligence of the Respondent nor the invalidity of the release would support a jury verdict in favor of the Petitioner, even if the Judge had allowed either question to go to the jury.

QUESTION ONE

THE QUESTION FOR DETERMINATION IS WHETHER OR NOT THE PETITIONER'S EVIDENCE IN SUPPORT OF HIS ALLEGATIONS THAT THE RELEASE WAS WITHOUT CONSIDERATION AND WRONGFULLY PROCURED BY MEANS OF FRAUD AND DURESS WAS SUFFICIENT TO WARRANT ITS SUBMISSION TO THE JURY

The above question, which the Respondent feels is the only question that could possibly be before this Court, was quoted from the decision of the Supreme Court of North Carolina (R. 55). Certainly, it cannot be argued or contended that the Supreme Court of North Carolina was unaware of the problem before it and did not take due cognizance of it.

I

Considering the Petitioner's allegation that the release was not supported by consideration, the following evidence should be clearly noted:

(a) The payment made to Petitioner Maynard was made for time lost (R. 45) and represented wages he would have earned had he worked the twelve (12) days that he was away from work due to the alleged injury (R. 46).

(b) The Petitioner admitted that the money paid him was not for labor or services rendered and that the money paid him was equivalent to the money that would have been due him had he worked and performed services (R. 26). There was no evidence that the money was due the Petitioner under any contract or any understanding of any nature whatsoever except upon the consideration of executing a release (R. 30, 34, 45).

(c) The Petitioner was an experienced railroad man and had worked for the Seaboard Railroad for a period

of nine years prior to coming to work for the Respondent (R. 25).

(d) Petitioner's own witness, B. F. Bailey, testified that prior to his retirement on September 15, 1958, he had worked for the Respondent for more than forty years and that during the last years he was Chairman of the local Union and that it was part of his job to see that laborers with whom he was associated got a fair break (R. 34, 35), and that he, Bailey, knew that the policy and rules of the Respondent for the forty years were that an injured employee did not get wages when the allegedly injured employee had been out of work unless the allegedly injured employee signed a release when the allegedly injured employee returned to work (R. 35); therefore, Petitioner's own witness unquestionably established the unimpeachable fact that any payment to an allegedly injured employee who had been off from work was for and in consideration of the injured employee's signing and executing a valid and binding release with the defendant railroad, as did Petitioner Maynard on September 17, 1955.

(e) The Respondent dealt with the Petitioner in good faith at all times (R. 26, 29, 31, 34),

> "A release after injury for a good consideration, and in the absence of proof that it was not fairly entered into is binding upon the parties, and a bar to an action for damages." *Mitchell* v. *Louisville, Etc. R. Co.*, 194 Ill. App. 77 (1915). See, also, *Kusturin* v. *Chicago, Etc. R. Co.*, 287 Ill. 306, 122 NE 512 (1912); *Lindsey* v. *Acme Cement Plaster Co.*, 220 Mich. 367, 190 NW 275 (1922); *Patton* v. *Atchison, T. & S. F. R. Co.*, 59 Okla. 155, 158 P. 576 (1916); *Ballenger* v. *Southern R. Co.*, 106 SC 200, 90 SE 1019 (1916); *Panhandle, Etc. R. Co.* v. *Fitts*, 188 SW 528 (Tex. Civ. App., 1916).

If the settlement with the Petitioner in the sum of $144.60 be invalid, under the circumstances existing at the time of the settlement, one in the sum of $10,000.00 would be equally so. To hold with the Petitioner would be to preclude the possibility of any settlement between injured employees and the railroad company out of courts under its standing policy which has been in effect in excess of forty years (R. 34, 35), under which policy the railroad company has evidently paid many thousands of dollars to compromise and settle any contingent liability on its part to an injured employee when the injured employee returned to work. In the instant case, the contract of release and payment to the Petitioner could only have been a recognition of Respondent's contingent liability to the Petitioner and a satisfaction thereof, and the Federal laws do not prevent compromise or settlement of a disputed or contingent claim made fairly and in good faith. *Culver* v. *Kum*, 354 Mo. 1158, 193 SW 2d 602 (1946), 166 ALR 644. Certainly, Respondent's method of settling with allegedly injured employees who had been away from work has been considered fair for the past forty years (R. 34) and had it been otherwise, the Respondent is certain that evidence of same would have been introduced by the Petitioner.

In addition to the monetary consideration received by the Petitioner for and in consideration of the execution of the release, the Respondent promised the Petitioner that the Respondent possibly would take care of his doctor bills in the future, if he had any (R. 46). The Respondent did, in good faith, provide him with the best medical care available (R. 27) and kept his job open for him from May 16, 1956 until December 1956 (R. 29), and it cannot be argued that

the defendant railroad did other than give the Petitioner a "fair break" at all times (R. 34).

In reference to the Petitioner's written contentions herein that the $144.60 was "the exact amount due him at the time for labor" or was due for "labor performed" or for "wages", the Respondent respectfully queries as to which pay period the Petitioner would contend that the amount of money covered, weekly, bi-monthly, or monthly. The Petitioner's testimony was that he made $291.50 a month (R. 22), and it is inconceivable to Respondent that any reasonable person could, in good faith, state that the sum of $144.60 was due the Petitioner for "labor" or for "labor performed" prior to Saturday, September 17, 1955. Further, since the Petitioner brought to the attention of the Court that the release was signed on a Saturday morning, "a day which laborers normally receive their wages", it is posed as to whether or not the Petitioner now contends that he was due $144.60 for one week's labor. Again, these points only tend to show the frivolity of the Petitioner's position in his whole cause, and, in particular, the Petition filed herein.

It is submitted that the principles of law cited by the Petitioner in connection with the failure of consideration are substantially correct; however, the record of this case does not bring the facts within the principles of law stated and relied upon by the Petitioner.

II

As stated, the second basis upon which the Petitioner attacks the validity of the release was that its execution was procured by fraud, misrepresentation and undue influence. To support the allegations, the Peti-

tioner summarizes the evidence briefly, which summary the Respondent submits is erroneous.

(a) The Petitioner did not go to the General Manager's office on September 17, 1955, to get a paycheck owed him in the sum of $144.60 for *labor* or *wages* due. To the contrary, the Petitioner himself admits that he was not working during the period for which the $144.60 was paid (R. 26), and this fact is substantiated by the testimony of Dr. James S. Wilson (R. 48) and Mr. McAllister (R. 46). The only reason the Petitioner received the sum of $144.60 was for and in consideration of the settlement and compromise of a contingent liability (R. 34, 35).

(b) The Petitioner had been taking medicine prescribed by the doctor, but was not irrational because of same (R. 48), and there is no evidence in the record that the Petitioner was irrational on September 17, 1955, or that if, in fact, he were irrational, the Respondent had knowledge or information concerning same.

(c) The Court's attention is invited to the fact that the meeting in question in the Respondent's General Manager's office was on a Saturday, and that Petitioner Maynard did not work on Saturdays (R. 45), and that the office personnel of the Respondent did not work on Saturdays. Certainly, the meeting in question did not take place on a day when Petitioner Maynard normally received his wages. In addition, Maynard normally received his *wages* in Apex, North Carolina, and did not have to go to Durham to get any wages for labor performed (R. 45), and Petitioner Maynard admitted that it was a different place from where he usually signed for his paycheck (R. 31).

Maynard, as an experienced railroad man, certainly knew that he did not receive wages for labor from the General Manager of the railroad and then be required to have a receipt for same witnessed in front of two other employees (R. 21, 26, 50C).

(d) The Petitioner had been required to sign for every paycheck he had received from the Respondent (R. 21), but he admitted that the release he signed on September 17, 1955, was not "the kind of thing that I would sign for my regular paycheck", (R. 26), and it is suggested that the release is abundantly different from a payroll record which railroad employees are required to sign upon receiving their checks for wages earned. The Petitioner was an experienced railroad employee (R. 25), and was reasonably well educated (R. 25).

(e) Mr. McAllister had not seen the Petitioner between the date the Petitioner was allegedly injured and the date of September 17, 1955 (R. 45). Mr. McAllister prepared the release based on information that Petitioner Maynard entered on the accident report form (R. 47), a copy of which report had reached McAllister some three or four days after Maynard's alleged injury. McAllister dealt with Petitioner Maynard in good faith, based on Maynard's representations, and explained in detail to Maynard the contents of the release (R. 46), and Maynard stated that the sole purpose of his visit to Durham, North Carolina, on a Saturday was to settle up with the Respondent and execute the release (R. 45), and the release, under seal, was properly witnessed (R. 46). McAllister did not know what Maynard's disability was; *he did not make any false representations; he did not make any deceitful suggestions; he did not make any fraudulent*

suggestions, and Maynard did not think he was going to be hurting in the future (R. 31, 45).

The Respondent respectfully submits that the record, when considered in its entirety, does not raise one iota of relevant evidence tending to invalidate the release, and that Petitioner's evidence, when considered as a whole, clearly shows no genuine issue of fact relevant to the validity of the admitted release, and that there was no genuine issue to be submitted to the jury concerning the same.

The only representations found any place in the record concerning the release were made by Petitioner Maynard, and if he misrepresented the facts in his accident report which Mr. McAllister relied upon when preparing the release form on September 17, 1955, the representations or misrepresentations were within the sole knowledge of Petitioner Maynard.

In *Kavadas* v. *St. Louis Southwestern R. Co.*, 263 SW 2d 736 (Mo. 1954), the plaintiff brought an action for alleged injury under the Federal Employers' Liability Act, and the facts indicated that plaintiff had missed one day's pay. When he went to the claim agent to receive the money for the day's pay missed, the plaintiff signed and executed a release, held it long enough to have apparently read it and then signed it. Plaintiff had arrived in the United States from Greece in 1946, signed the release on July 24, 1951. Plaintiff could not read English and could only write his name. Issue of misrepresentation as concerns releases was submitted to the jury. The verdict was for the plaintiff in the sum of $3,700, and the defendant appealed.

On the appeal of the *Kavadas* case, the appellate court held that the trial court should have directed a

verdict for the defendant and reversed the lower court's judgment. The appellate court gave as its reason for reversing the trial court the following:

> "We have carefully searched the transcript and find no evidence to prove this allegation. There is not the slightest intimation in plaintiff's testimony that defendant's agent referred to the release as a receipt."

Kavadas' testimony was to the effect that he went to the "'pay man' (claim agent)" to get his pay for the day he missed and for which he had received no wages. The claim agent prepared a statement of facts and gave the statement to the plaintiff and did not explain anything to the plaintiff. The agent testified that he had asked plaintiff if everything was all right and plaintiff had answered that it was. In addition, when the plaintiff had reported the accident which caused his one day's absence from work on July 8, 1951, it was necessary to get another worker that witnessed the accident to give his version of the accident "because of his better knowledge of English" in order to fill out the accident report. In answering plaintiff's contention of fraud by silence, the Court said that the evidence in the case did not disclose any act or conduct on the part of defendant's agent THAT WAS DESIGNED TO PRODUCE A FALSE IMPRESSION. Noting that false impressions may be created by silence, the Court related the facts of a case where it was properly held that silence created a false impression . . . *Scott* v. *American Mfg. Co.*, 20 SW 2d 592 (Mo. 1929).

In the *Scott* case, the plaintiff, upon being released from the hospital, needed money. He went to his employer's office and received $75.00 and signed some

papers, one of which was a release. However, on several occasions previously when plaintiff had needed money, he had gone to the same office, received an advance against his pay and signed papers so that the advance could be deducted from his pay checks. Of course, the Kavadas case was properly distinguished from the Scott case, as it is distinguishable from the instant case.

The Court, in the *Kavadas* case, continued in its decision as follows:

> "There is some evidence in the record to indicate that plaintiff sustained substantial injuries, and we must, therefore confess that we are reluctant to hold that he is barred from recovery because he signed a release upon the receipt of $12.18. However, this Court cannot relieve the plaintiff of the consequences of his bargain without a valid, legal reason for doing so. Mere inadequacy of consideration alone is not enough. *Vondera* v. *Chapman*, 352 Mo. 1034, 180 SW 2d 704. To hold otherwise would establish a precedent which would make it difficult to settle controversies and would be contrary to the established policy of the law to encourage peaceful settlements . . . "

The Respondent's position in law and fact is further substantiated in the case of *Williams* v. *East St. Louis Junction R. R. Co.*, 349 Ill. App. 296, 110 NE 2d 700 (1953). In this case, the facts were that a personal injury action was brought under the Federal Employers' Liability Act, and the defendant set up a release which the plaintiff had signed under seal, and pleaded the same as a defense to the personal injury action. Upon a verdict by the jury in favor of the plaintiff, the trial Judge set the verdict aside and the plaintiff appealed.

Plaintiff Williams had testified that he was off from work for six days and received a paycheck which did not include pay for the six days during which he was absent from work. Plaintiff Williams thereafter went to see a Mr. Reichert concerning the pay for the six days that he was absent from work. Mr. Reichert did not say anything to the plaintiff except that he should "sign here and get your check", and the check was only for the time lost. Mr. Reichert did not say anything about a settlement or compromise or a release or anything connected therewith. The plaintiff signed the paper without reading same.

In affirming the trial Judge's action in setting the verdict aside and rendering judgment in favor of the defendant, the Court stated as follows:

> "Plaintiff very strenuously insists that the validity and effect of this release should be adjudged under Federal procedure and that under Federal procedure it is required that the question of the validity of a release be submitted to and acted upon by the jury and that the jury's verdict is binding. He relies upon *Dice* v. *Akron, Canton & Youngstown R. R. Co.*, 342 US 359, 72 S. Ct. 312, 96 L. Ed. 398. It is unquestionably true that Federal law controls actions under the Federal Employers' Liability Act in the Federal as well as State courts. The Dice case, supra, however, is authority only for the proposition that where there is competent evidence to support the claim of fraud in securing a release, the question must be submitted to a jury for a determination. It furnishes no authority that the courts may not direct a verdict or grant judgment notwithstanding the verdict where there is no evidence to sustain the allegations of fraud. Furthermore, Federal law is settled that in order to avoid the effect of a release the burden is on the one attacking the settle-

ment to show that the contract is tainted with invalidity either by fraud or mutual mistake of fact. *Callen* v. *Pennsylvania R. Co.*, 332 US 625, 68 S. Ct. 296, 92 L. Ed. 242, 247. Therefore, the burden rested upon the plaintiff to produce evidence to show fraud as alleged in his reply to the affirmative matter in defendant's answer . . .

The evidence of plaintiff fails to disclose that any agent of the defendant made any misrepresentations about the instrument that he was required to sign in order to get his check for wages for the period he did not work, and, in fact, plaintiff stated on cross-examination that the witness Reichert did not represent the instrument as being simply a receipt for wages."

The Respondent respectfully submits that there was no genuine issue of fact relevant to the validity of the admitted release raised by the Petitioner in any manner, and that there was no issue for the jury to determine under the law of *Dice* v. *Akron, Canton & Youngstown R. Co.*, supra, cited by the Petitioner.

In *Callen* v. *Pennsylvania R. Co.*, supra, the Supreme Court stated:

" . . . Until Congress changes the statutory plan, the releases of railroad employees stand on the same basis as the releases of others. One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted."

The right to trial by jury in North Carolina is scrupulously protected by the trial courts and the Supreme Court of North Carolina as required by the Constitution of the State of North Carolina. Art. I, Sec. 13, 19,

Art. IV, Sec. 1, 13; Const. U. S. Art. III, Sec. 2; Amendments VI, VII; and it is suggested that it is not a novel question to the Supreme Court of North Carolina as to when the Petitioner has submitted enough evidence to carry his cause to a jury; North Carolina General Statute 1-183.

QUESTION TWO

SHOULD THE SUPREME COURT OF THE UNITED STATES REVIEW A JUDGMENT OF THE SUPREME COURT OF ONE OF THE SEVERAL STATES WHEN THE ONLY ERROR THAT COULD HAVE POSSIBLY OCCURRED IN THE STATE SUPREME COURT IS AN ERROR IN THE STATE SUPREME COURT'S ANALYSIS OF THE EVIDENCE BEFORE IT?

The trial court's decision below was carefully reviewed by the North Carolina Supreme Court which did not overlook the cases cited by the Petitioner in his Brief for this Writ. Both the Petitioner and the Respondent discussed fully these cases in their Briefs and in their oral arguments before the North Carolina Supreme Court. The Supreme Court of North Carolina did not state or intimate that the right to trial by jury guaranteed by the Federal Employers' Liability Act did not extend to a disputed release to the same extent that it does to an issue of negligence, and the Respondent finds nothing in the record to substantiate Petitioner's contentions that the decision of the Supreme Court of North Carolina is in direct conflict with the relevant decisions of the Federal courts, as contended in his Writ of Certiorari. Clearly, if this Honorable Court were to reverse the Court below, it would then be saying, in effect, that every case arising under the Federal Employers' Liability Act must be submitted to the jury and that the trial court and the Supreme Courts of the various states do not have any discretion in determining whether or not there is a

genuine issue of fact to be submitted to the jury. It is respectfully submitted that the Supreme Court of the United States is a court of law rather than a court of correction of errors in fact finding and should not desire to undertake to review the evidence submitted in a trial court in one of the several states in the absence of a very obvious and exceptional showing of error and abuse of discretion; *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac Co.*, 321 US 275 (1944); *District of Columbia* v. *Pace*, 320 US 698 (1944); *Williams Manufacturing Co.* v. *United Shoe Machinery Corp.*, 316 US 364 (1942); *Baker* v. *Schofield*, 243 US 114 (1917); see *Graver Manufacturing Company* v. *Linde Co.*, 336 US 271 (1949).

It is respectfully submitted that the Supreme Court of the United States does not intend to become a "super" Supreme Court to review discretionary decisions rendered by the various State courts, and that the North Carolina Supreme Court should be affirmed under the facts and law before this Court, and, in this connection, the Respondent respectfully calls the Court's attention to *73 Harvard Law Review*, at Page 84 (1959), and, particularly, beginning at No. 8 on Page 96 to No. 10 on Page 99; and also to *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 US 107 (1959) (Dissenting Opinion); *Inman* v. *Baltimore & Ohio R. R. Co.*, 361 US 138 (1959).

Remarking briefly on Petitioner's various Points argued in his Brief, the Respondent notes that the Petitioner nowhere in his Brief fairly argues or discusses the questions presented in his Petition for the Writ of Certiorari or the questions set forth in his Brief. Rather, the Petitioner discusses and argues five various Points which appear to be without contro-

versy, under the Federal decisions and the decision of the North Carolina Supreme Court in the instant case. Nowhere in his Brief does the Petitioner show or attempt to show wherein the decision of the Supreme Court of North Carolina in the instant case is directly in conflict with the relevant decisions of the Federal courts and with standards imposed by the Federal law as set forth in his reasons for granting the Writ. Petitioner's Points of argument and Respondent's remarks concerning same are as follows:

PETITIONER'S POINT ONE

FEDERAL, NOT STATE, LAW PREVAILS

As recognized by the Supreme Court of North Carolina, the Respondent concedes that Federal, not State, law prevails in the action before the Court (R. 55). This Point was not in controversy below and it is not in controversy here.

PETITIONER'S POINT TWO

DEFENDANT CONCEDES EVIDENCE SUFFICIENT TO TAKE THE CASE TO THE JURY HAD THE PLAINTIFF NOT SIGNED THE SO-CALLED RELEASE

The Respondent admits the correctness of the above statement, and there was no issue or controversy concerning same in the Court below; however, the Respondent is sure that had the release not existed and had the issues been submitted to the jury only upon the question of negligence and damages, the learned trial Judge would have been required, under law and equity, to set the verdict aside had the issues been answered in favor of the Petitioner. Certainly, such a jury verdict would have been against the preponderance and greater weight of the evidence (R. 33, 36, 41, 42, 43, 44, 45), and would have properly been set aside, in accordance

with this Court's directions as set out in *Rogers* v. *Missouri Pac. R. R. Co.*, 352 US 500, 510, (1957).

> "The decisions of this Court, after the 1939 Amendments, teach that the Congress vested the power of decisions in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ where the fault of the employer played any part in the employee's injury."

PETITIONER'S POINT THREE

ONLY PREPONDERANCE OR GREATER WEIGHT OF EVIDENCE IS REQUIRED TO SET ASIDE RELEASE

The Respondent concedes that the above is the correct statement of the law *and was recognized by the Supreme Court of North Carolina as quoted in Petitioner's Brief herein*, however, for emphasis, the Respondent reiterates that the sole question below and the sole question here, if there be a valid one, is whether or not a genuine issue of fact existed requiring the submission of the evidence concerning the release to the jury. As stated, concerning Petitioner's Points One and Two, Point Three is not in controversy before this Court (R. 55). The law seems to be well settled, and the Supreme Court of North Carolina made no error in connection therewith. *Point Three would be pertinent only in the event there was a jury verdict and has no bearing on whether or not an issue should be submitted to the jury.*

PETITIONER'S POINT FOUR

SO-CALLED RELEASE UNSUPPORTED BY ANY CONSIDERATION AND THEREFORE VOID

The Respondent has heretofore covered the above Point under Question One and submits that there was a valid and sufficient consideration paid unto the Peti-

tioner for, and in consideration of his executing the release (R. 57, 58).

PETITIONER'S POINT FIVE

EXECUTION OF SO-CALLED RELEASE PROCURED BY FRAUD, MISREPRESENTATION, AND UNDUE INFLUENCE ON PART OF DEFENDANT'S AGENTS REQUIRED SUBMISSION TO JURY

The Respondent agrees with the Petitioner that "if there are any genuine issues of fact relevant to the validity of a purported release, such issues are to be determined by the jury, not by the trial Judge", but respectfully submits that in the within action, the Petitioner did not show any fraud or duress on the part of the Respondent or its agents, but, on the contrary, his own testimony negatives his allegations in that respect (R. 58), as recognized by the Supreme Court of North Carolina (R. 58) and by the trial Judge below (R. 54).

CONCLUSION

The Respondent respectfully concludes that:

1. The Petitioner grossly mis-stated the facts of this cause in his Petition for Writ of Certiorari and in his Brief on the merits, as will be evident upon the reading of the evidence before this Honorable Court.

2. Each Point of Law discussed and argued by the Petitioner was correctly interpreted by the Court below, and the decision of the Supreme Court of North Carolina in the instant case is not directly in conflict with the relevant decisions of the Federal courts as set forth in Petitioner's Writ of Certiorari, on Page 4, under the heading, "Reasons for Granting the Writ".

3. The Petitioner has not discussed or argued in his Brief the questions presented in his Petition for Writ

of Certiorari, but argues Points not in controversy and Points wherein the Supreme Court of North Carolina was not in any manner or wise in conflict with Federal decisions, as will be noted in Petitioner's own Brief, wherein he quotes the said Supreme Court of North Carolina as substantiating his contentions as to the law.

4. All of the cases cited by the Petitioner in his Brief, including the Supreme Court of North Carolina, are substantially correct as they pertain to the law; however, the Respondent submits that the Petitioner himself has misinterpreted the facts of the within case and has misapplied the facts of the within case to the cases he has cited, and that the decision of the Supreme Court of North Carolina should be affirmed in all respects. Especially is this true since the Petitioner has not alleged in his Brief and cannot show that the Supreme Court of North Carolina made any error of law and did not recognize the Federal decisions. Regardless of the authorities cited by the North Carolina Supreme Court, it did recognize the correct rules and standards imposed upon it by the Federal courts.

Respectfully submitted, this 22nd day of November, 1960.

CHARLES B. NYE
Durham, North Carolina

CLEM B. HOLDING
Raleigh, North Carolina

Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Charles B. Nye, Counsel for the Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this the below-noted date, I have served a true copy of the above foregoing Brief for Respondent, by mailing on this date such true copy in duly and properly addressed envelope, first class postage prepaid, to the Petitioner's attorney as follows:

To: Charles F. Blanchard, Esq.
Attorney at Law
1006 North Carolina National Bank Building
Raleigh, North Carolina

This the 22nd day of November, 1960.

CHARLES B. NYE
Attorney for Respondent
314 Trust Building
Durham, North Carolina

PETITION NOT PRINTED

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 183

EUGENE E. MAYNARD,

Petitioner,

vs.

DURHAM AND SOUTHERN RAILWAY COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NORTH CAROLINA

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Respondent Railroad contends that "with respect to the question of consideration, the Petitioner's testimony, standing alone, shows that the $144.60 he received for and in consideration of signing the release was not money earned and was not for labor performed" (Respondent's Brief, p. 12). However, the Petitioner testified that the railroad owed him $144.60 for labor at the time the release was signed (R. 21).

The plaintiff never changed his testimony in this respect.

The Railroad in its brief attempts to nullify this evidence of the Petitioner by calling attention to the testimony of the Petitioner's witness, B. F. Bailey, that the policy of the railroad was that "you don't get your wages when you have been off from work unless you sign a release" (R. 35).

"The Respondent would also stress that this same witness "discussed" the injury with the Petitioner prior to Petitioner's signing the accident report (Respondent's Brief, p. 7). Therefore, argues the Respondent, the conclusion is incontrovertible that the Petitioner "knew or should have known that it had been the policy and rule of the railroad not to pay wages (or the equivalent of wages) to any injured employee" in the Petitioner's circumstance. This argument is made despite the fact that there is no evidence that the Petitioner knew of this so-called "policy" nor that in the discussion with the Petitioner's witness, B. F. Bailey, the chairman of the local union, he was ever apprised of the so-called "policy."

The North Carolina Supreme Court declared that "there is no evidence in the record before us to support the contention of plaintiff that he was entitled, as a matter of right, to the $144.60 as wages for the time he did not work because of his alleged injuries." In doing so, the Court completely overlooked the plaintiff's own testimony as follows:

> "I signed the paper because every check that we ever got from the railroad we had to sign for it. I THOUGHT I HAD TO SIGN IT FOR MY PAY CHECK. AT THAT TIME THE RAILROAD OWED ME $144.60 ODD CENTS FOR LABOR. I NEVER RECEIVED ANYTHING FROM THE RAILROAD AS A RESULT OF THE INJURY WHICH I HAVE DESCRIBED HERE TODAY" (R. 21). (Emphasis added.)

The rule long followed by the overwhelming majority of courts—North Carolina included—is that "in passing on the defendant's motion for a nonsuit, the evidence on behalf of the plaintiff *must be accepted as true, and all conflicts in testimony must be resolved in his favor.* (Emphasis added.) 53 Am. Jur. "Trial" § 314.

This rule has long prevailed in North Carolina and has been variously stated in recent cases as follows:

> On motion to nonsuit, evidence is to be taken in light most favorable to plaintiff, and he is entitled to benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. G. S. § 1-183, McCombs v. McLean Trucking Co., 114 S. E. 2d 683, 252 N. C. 699.
>
> On motion for nonsuit, the court takes evidence favorable to plaintiff as true and resolves all conflicts of testimony in his favor. Pruett v. Inman, 114 S. E. 2d 360, 252 N. C. 520.
>
> On motion for compulsory nonsuit, the evidence must be viewed in light most favorable to plaintiff and he must be given the benefit of every legitimate inference to be drawn therefrom. Smith v. City of Hickory, 113 S. E. 2d 557, 252 N. C. 316.

Unquestionably, there were two clear issues of fact in this important Federal Employers' Liability Act case, and by its failure to allow the jury to pass on these questions, the North Carolina Supreme Court misinterpreted the letter and spirit of the Act.

Respectfully submitted,

/s/ CHARLES F. BLANCHARD
CHARLES F. BLANCHARD
WILLIAM T. HATCH
SAMUEL H. JOHNSON
WILLIAM JOSLIN

Counsel for Petitioner

This the 4th day of January, 1961.

SUPREME COURT OF THE UNITED STATES

No. 483.—October Term, 1960.

Eugene E. Maynard, Petitioner, v. Durham and Southern Railway Company.	On Writ of Certiorari to the Supreme Court of the State of North Carolina.

[February 20, 1961.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner, an employee of respondent, sued in a North Carolina court for damages under the Federal Employers' Liability Act, 45 U. S. C. § 51. As a defense, respondent tendered a release signed by petitioner and moved for a nonsuit. The motion was allowed after all the evidence was in, and the Supreme Court of North Carolina affirmed, one judge dissenting. 251 N. C. 783, 112 S. E. 2d 249.

We said in *Dice* v. *Akron, C. & Y. R. Co.*, 342 U. S. 359, 361, that the "validity of releases under the Federal Employers' Liability Act raises a federal question to be determined by federal rather than state law." While that case dealt with a release challenged on the ground of fraud, the rule it announced also governs releases challenged for lack of consideration. For releases obtained by fraud or for no consideration could equally defeat the federal rights created by this Act of Congress. It was because of our doubts that the decision below squared with that rule that we brought the case here on certiorari. 363 U. S. 839.

Petitioner was injured August 22, 1955, and came back to work on September 12, 1955. On September 17 he signed the release in question. There is conflicting evidence as to what happened at that time. According to petitioner he went into the office of Mr. McAllister, Gen-

eral Manager, and asked for his pay check; Mr. McAllister "gave me a paper, told me to sign that, and I signed it"; petitioner did not read the paper; he signed it "because every check we ever got from the railroad we had to sign for it"; he signed thinking he was signing for his pay check; he thought the railroad owed him $144.60 for labor, the amount he received; he "never received anything from the railroad as a result of the injury." Petitioner also testified that some six months after he received the $144.60, he was asked to sign a release for his injuries and refused. As to the paper he signed on September 17, petitioner further testified that Mr. McAllister "didn't make me any false representations. The only thing he did there, he just didn't explain the paper to me. He didn't make any deceitful suggestions to me. He didn't make any fraudulent suggestions to me." Petitioner also testified, "The $144.60 that I received there from Mr. McAllister was not for injuries. That was my pay check."

On the other side there was testimony by a former employee, who was petitioner's witness, that it was the policy of the company not to pay wages for the time a person was "off from work" unless he signed a release and that policy applied when an employee did not work because of an injury. This witness also testified that in a conversation he and petitioner had with Mr. McAllister,* McAllister told petitioner he would have to sign a release before he could get back pay. Moreover, Mr. McAllister testified that petitioner stated "that he would like to settle up with the company, that he was broke and needed some money"; that McAllister told petitioner "that if we

*The witness, who was Chairman of the local union at the time of the accident, could not remember whether this meeting took place before or after September 17, 1955 (the date of the release), although he was sure it took place after August 22, 1955. Petitioner testified this meeting took place after September 17.

settled up with him it would be necessary for him to sign a release"; that petitioner said he was "willing to sign a release" and that that was "the purpose of his visit"; that he, McAllister, explained to petitioner what was in the release and that if he signed it he would be paid "for his time lost"; that McAllister did not promise "any future payments" if petitioner signed the release "except that possibly we would take care of his doctor's bills if he had any."

In addition petitioner testified that while he did not know it was the railroad's policy to pay an injured employee for time lost only upon signing a release, "this wasn't the kind of thing that I would sign for my regular pay check. I didn't know what it was. I just did not give it no thought."

We find no evidence sufficient for a jury that respondent obtained the release by fraud, duress, or undue influence. We conclude, however, that there was a jury question as to whether the release was given for a consideration.

We think the correct rule concerning the adequacy of consideration for a release of claims under the Act was stated in *Burns* v. *Northern Pac. R. Co.*, 134 F. 2d 766, 770. "In order that there may be consideration, there must be mutual concessions. A release is not supported by sufficient consideration unless something of value is received to which the creditor had no previous right." If, in other words, an employee receives wages to which he had an absolute right, the fact that the amount is called consideration for a release does not make the release valid. See *Hogue* v. *National Automotive Parts Assn.*, 87 F. Supp. 816, 821.

On this record there is a genuine issue of fact concerning the presence of consideration for the release. Petitioner claimed that what he received was his pay check, rightfully owing. Against that was evidence that no back wages were due and that an amount equal to back

wages was paid for the release. It is not for the judges to resolve the conflict and to conclude that one side or the other was right. The issue of fact that is presented is one on which fair-minded jurors might honestly differ. Cf. *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 510.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 183.—October Term, 1960.

Eugene E. Maynard, Petitioner, v. Durham and Southern Railway Company.	On Writ of Certiorari to the Supreme Court of the State of North Carolina.

[February 20, 1961.]

Mr. Justice Frankfurter, dissenting.

This case was brought here on a meager typewritten petition which invoked the Court's certiorari jurisdiction on the claim that the North Carolina Supreme Court had disregarded controlling federal standards for determining the validity of a release from liability under the Federal Employers' Liability Act. In reversing the North Carolina Supreme Court, this Court does not support the grounds on which review was urged. The oral argument dispelled such a claim and revealed, what the Court's opinion now recognizes, that the conflict between the state court and this Court turns on assessment of the trial testimony. This Court has repeatedly announced that the writ of certiorari is not to be employed to pass on matters of evidence and our Rule 19 formally bars such an obvious misuse of our discretionary jurisdiction. Again and again we deny petitions for certiorari which merely raise disputed issues of fact. Instead of making cases arising under the Federal Employers' Liability Act an exceptional class, Congress in 1916 explicitly withdrew Federal Employers' Liability cases from the Court's obligatory jurisdiction. 39 Stat. 727. For reasons set forth at length in my dissenting opinion in *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 524, I would dismiss this writ as improvidently granted. Doing so after argument has been had would serve to discourage petitions

brought solely to review matters of evidence; to adjudicate the case on the merits by taking one view of the evidence as against another only encourages petitions that ought not to be filed here. See *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387.

SUPREME COURT OF THE UNITED STATES

No. 183.—October Term, 1960.

Eugene E. Maynard, Petitioner, v. Durham and Southern Railway Company.	On Writ of Certiorari to the Supreme Court of the State of North Carolina.

[February 20, 1961.]

Mr. Justice Whittaker, with whom Mr. Justice Harlan joins, dissenting.

Petitioner was employed by respondent as a "section" worker at Apex, North Carolina. He normally worked five eight-hour days per week, and was compensated for hours worked at a rate aggregating about $290 per month. The record is not entirely clear on the point, but it would appear that he had received the wages he had earned through Friday, August 19, 1955. On Monday, August 22, he was injured in the course of his work, but he worked the remainder of the day and also the next, Tuesday, August 23. He was then off work for a total of 19 days, 13 of which were working days, returning to work on Monday, September 12, and working through Friday, September 16, of that week. On Saturday, September 17, he signed a "Release" of all claims against his employer on account of his injury and delivered the same to his employer in exchange for its check to his order in the amount of $144.60—which, it appears, is the exact amount he would have earned had he worked each day through the period he was off.

At the conclusion of the trial of his action, brought under the Federal Employees Liability Act against his employer, the trial court rejected his contentions that the "Release" was (1) obtained by fraud and (2) was not supported by any consideration, held the "Release"

to be a valid bar of his claim for damages, and dismissed the suit. On appeal, the Supreme Court of North Carolina affirmed, 251 N. C. 783, 112 S. E. 2d 249, and we granted certiorari. 363 U. S. 839.

The only question here is whether that judgment was justified by the record. With all respect, I think it was.

I agree with the Court that the evidence wholly failed to sustain the claim of fraud. In fact, as the Court's opinion shows, petitioner's testimony affirmatively discloses that there was none. He testified that respondent's officer, with whom he dealt in respect of the "Release," "didn't make me any false representations. He didn't make any deceitful suggestions to me. He didn't make any fraudulent suggestions to me."

But I am equally unable to find in the record any evidence to show that the "Release" was given without consideration. Petitioner admits that he was required to sign the "Release" before respondent would pay him the $144.60 which he received in exchange for it. Of course, I agree with the Court's statement of the law that "'A release is not supported by sufficient consideration unless something of value is received to which the [releasor] had no previous right.' If, in other words, an employee receives wages to which he had an absolute right, the fact that the amount is called consideration does not make the release valid."

Here, however, there is no evidence that the $144.60 which petitioner received in exchange for the release had been earned by, or was due, him. It is true that amount was exactly the sum he would have earned in the relevant period had he worked. But he did not work in that period. He admits that he was off work from Wednesday morning, August 23, to Monday morning, September 12—a total of 19 days, 13 of which were working days. Of course, he could have had a contract with his employer

obligating it to pay him normal wages while disabled by injury or sickness. But he has not shown that any such contract existed.

As I read and understand them, these undisputed facts fail to show that the amount paid by respondent to petitioner for the Release was his own money—money that he had earned as wages, or that was otherwise owing to him. As I see it, then, petitioner has wholly failed to produce any evidence to show that the Release was made without consideration.

Whether petitioner may have had a solid basis to rescind the Release—upon the ground of mutual mistake of fact, *i. e.*, that he was more seriously injured than either he or respondent believed at the time the Release was made, of which there is considerable indication in the record—would present a question of more substance. But that question is not before us, as petitioner has not proceeded on that theory.

On the record as it stands, I think the North Carolina courts were right, and that their judgment should be affirmed.